Supreme Court, U.S.
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No. ____

IN THE
SUPREME COURT OF THE UNITED STATES

GRETA CRAWFORD,

Petitioner,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, UNITED STATES OF AMERICA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether 5 USC ss. 7701-03, *McDonnell Douglas v. Green*, 411 US 792 (1973) and *Bush v. Lucas*, 462 US 367 (1983), prohibit agencies from revising 5 CFR s. 731.501(a) so that federal employment suitability is determined by proving charges alone, when that same revision also forecloses the means to ensure proper proceedings, to disprove charges, to determine the appropriateness of charges, and to overturn agency determinations violating law and procedure.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Unpublished, the district and appeals court docket numbers are respectively 04-2619, and 06-11163 consolidated with 06-11387. Unofficial reports are at 245 Fed.Appx. 369, 2007 USApp. LEXIS 19540, 101 Fair Empl. Prac. 948, 19 Am. Disability Cas. 1333, 2006 USDist. LEXIS 80527.

JURISDICTION

The appeals court judgment and rehearing denial are dated respectively, 8/16/07 and 1/16/08. Jurisdiction is pursuant to 28 USC s. 1254(1). 28 USC s. 2403(b) may apply, but no court certified questions of a statute's constitutionality. Notifications under Supreme Court Rule 29.4 were made to the state, Solicitor and agency.

STATUTES INVOLVED

5 USC ss. 2301, 2302, 7701(c), 7703(c)

5 CFR ss. 731.202, 731.501

Fairfax County Code 5-1-1

I. STATEMENT OF THE CASE

Merit system principles require fair competition without arbitrary action or coercion, and with proper regard for privacy and constitutional rights. 5 USC s. 2301.

When an agency levels 5 CFR s. 731.202(b) suitability charges, the relevancy of charges is evaluated by 5 CFR s. 731.202(c) in terms of recency, seriousness, and other factors.

5 USC ss. 7701(c), 7703(c) require courts to void agency decisions when charges are not proven by preponderant or substantial evidence. Notwithstanding proof, determinations are not sustained when made pursuant to procedural errors, or in violation of laws like prohibited practices. Id. Prohibited practices include discrimination, obstruction of employment, consideration of non-suitability conduct and the collection of statements made without personal knowledge. 5 USC s. 2302(b).

Protections against agency abuses and mishandling were cut in 2002 by revisions to 5 CFR s. 731.501(a), which reads in part, "[i]f the Board finds that one or more charges are supported by a preponderance of the evidence, it shall affirm the determination."

Petitioner passed other clearances, but the Immigration and Naturalization Service, ["INS" or "agency"], found her unsuitable for an inspector

position in 5/03. The Board sustained two of six charges. The decision arose from a misdemeanor ticket and employment.

At the Board, INS argued that 501(a) meant only the fact of the charge need be proven. Consideration would be omitted of 202(c) factors and the agency's legal and procedural violations. INS claimed the "Board has jurisdiction over this suitability appeal to determine only whether the Agency has proven its charges by a preponderance of the evidence. 5 CFR s. 731.501(a)." 11/28/03-App.23-p.177.

The courts below supported the agency's view. These courts were wrong, and this Court should reverse.

Petitioner argued review could not be divested. The Board should have accounted for harmful violations. For instance, the agency's only evidence was an investigative Report entirely composed of uncorroborated hearsay. The district court did not address hearsay. At appeal hearsay was accepted, though impeached. App.-13. Sworn discovery responses show some interviews never even occurred. 5/5/06-p.3-4,6-10. 5/5/05-App5-p.11-12. 11/28/05-App.14,17-p.137,152-55.

Hearsay never proved a misconduct termination. Documentary evidence from the employer, Backus & Associates, ["B&A], showed the termination was no-cause. 11/28/05-App4-p.16-

37. 5/5/06-App.10-p.38. Speculating, records were not used or attached to prepare the falsely-chronicled criminal charges. No evidence supported the ticket as misconstrued by the Board. The Virginia ticket was for a 1996 drunk-in-public misdemeanor where Petitioner was considered intoxicated for having no shoes. The INS Prehearing gave the impression of two charges, 10/24/05-App.2-p.4, and the Board improperly re-alleged there was a confession by quoting the hearsay report (PRSI), though INS corrected allegations. Board p. 8. App.-p.54-55.

Petitioner argued that even where charges are considered proven, 202(c) factors demonstrated charges were de-minimus and no just-cause existed for unsuitability under published agency standards. 11/28/05-App24-p.180-81. 202(c) factors include the gravity of charges, recency, circumstances, and societal conditions. Under 202(c), charges were not recent, serious or without rehabilitation. Drunk-in-public and "personality" allegations are specifically categorized minor and hence, non-disqualifying. Circumstances did not support the charges either. For instance, *US v. Brown*, 401 F.3d 588, 597 (4th Cir. 2005), surveyed Virginia drunk-in-public cases and determined that motor skills must be affected to show intoxication, not the absence of shoes. Board p. 8. The ticket was essentially civil, expressly requiring no arrest, forbidding jail time, and using fines and

commitments.[1] *Hicks v. Feiock*, 485 US 624, 631-36 (1988). The citation should never have been considered. Virginia made no tape or transcript of proceedings to appeal from, requiring reversal of the conviction under *US v. Rosa*, 434 F.2d 964 (5th Cir. 1970).

An agency's violation of regulations is arbitrariness. *Gomez v. Air Force*, 869 F.2d 852, 861 (5thCir. 1989). Before the 501(a) revision, agency rulings were not sustained when based violations of law and procedure. In this case, most violations were disregarded below though they would have reversed the determination, and warranted damages in addition to back pay. 5 USC ss. 1214(g), 5596. 5 CFR s. 1201.201-204. Of the violations that were considered, essential prongs of the whistleblowing and discrimination claims were not examined because they relied on 202(c) factors and violations. For instance, pretext is essential to a disparate treatment claim, where 202(c) factors and agency violations show the reasons for not hiring were false or not the real reasons.

In addition to hearsay, other disregarded agency violations included reprisals and coercion. INS solicited testimony without personal knowledge, and lay medical testimony. 5 USC s. 2302(b)(2). 8/14/06-App.1-p.14-16. The Board added to or

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[1] Petitioner was held prior to trial, not sentenced to jail.

failed to sustain the "personality" charges in the 12/17/02 notice, instead picking from the more than 70-page report and finding a pet the employer approved of as cause. Board p. 5. 11/8/05-App.2,p.22-24.

Improper notice, INS changed the notice letter charges to different facts and employers. Eg., 11/28/05-App10,30-p.118,197. Distaste for coworkers was not charged, but improperly added post-Board. App.-p.53. *Greenspan v. VA*, 464 F.3d 1297, 1305 (Fed. Cir. 2006) (Board cannot consider or sustain charges not in the notice of proposed action, and agency must prove every element of noticed charges). Also improper notice, the INS claim of a 10-year investigation was inconsistent with the application that covered seven years. 8/15/06-App.1-p.8.

Non-suitability discrimination under 2302(b)(10) involved the decisionmaker's (Johnson's) consideration of non-charged issues,[2] non-misconduct terminations,[3] and non-pending,

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[2] Johnson's "whole person" method used uncharged issues. His 7/23/03 affidavit stated, "[w]hile a claim could be dismissed if only one past supervisor gave derogatory information about the appellant, I cannot ignore five separate employers." 11/8/05-App.4-p.37. Only three employers were charged and one remains.

[3] An agency's action is coercive when it should have known charges were not sustainable. *Schultz v. Navy*, 810 F.2d 1133, 1136 (Fed. Cir. 1987). Under 202(c), only

non-convictions.[4] The improper content prejudiced the determination. *Lutz v. USPS*, 485 F.3d 1377 (Fed. Cir. 2007).

In 9/03, INS argued that discovery should be denied because the "request is not relevant to whether Appellant committed the charges." 11/28/05-App.9-p.103,111. However, production of all relevant discovery was required at the Board. *Mitchell v. Espy*, 845 F.Supp 1474, 1498 (D.Kan. 1994).

A travesty, 501 permitted INS to not meet its burden of proof, to fail to show the appropriateness of the action under 202(c), to commit legal and procedural errors, to eviscerate essential elements of discrimination and whistleblowing claims, and to deny essential discovery.

After a full Board appeal was denied, Petitioner appealed to the US District Court. *Folio v. DHS*, 402 F3d 1350 (Fed. Cir. 2005) found review of all

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misconduct or negligence terminations can be considered, not lay-offs or no-cause terminations.

[4] Under 2302(b)(10), pre-application non-pending, non-convictions should not be charged and are only relevant when omitted from the application. Cf. *Boylan v. US*, 704 F2d 573, 576 (11th Cir. 1983) (post-employment charges). Johnson's affidavit shows improper presumptions of guilt and insanity were applied to non-convictions.

202(c) factors was required. Despite *Folio*, on 8/2/06, the court affirmed the Board at summary judgment just before trial, without review of 202(c) factors or most agency violations.

7703 expressly requires de-novo review of discrimination claims, but the court largely relied on the Board determination, decided without consideration of 202(c) and violations, and decided without the benefit of new discovery establishing the disparate impact and treatment claims, which was finally produced at district court.

The court deferred to the Board's civil service and whistleblowing determinations using a deference standard that was dormant for more than two decades.[5] 8/2/06-p.7.

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[5] The court's deference standard was inconsistent with prior de-novo rulings about previously Board-sealed matters. Regardless of a de-novo or deference standard, seals were warranted. Unopposed at the district court, the court argued that a common-law right-of-access to court records was balanced against secrecy. But secrecy pertains to public matters. Government collations of medical and personnel records, and investigation and criminal records are not public, but collations of private matter subject to invasion of privacy. *DOJ v. Reporters Comm.*, 489 US 749 (1989). Furthermore, clearances were required for report access, and a 4/01 seizure was expunged, prohibiting use for *any purpose*. Tex.Crim.P. 55.03-04. 11/28/05-App.4-p.43. Allegations of harassment, record misuse, and economic interference also warranted seals. *SEC v. Van Waeyenberghe*, 990 F.2d 845, 848 (5th Cir. 1993). *ACLU v. Chicago*, 431 F.Supp. 25 (NDIll 1976).

Early in proceedings, numerous claims were dismissed for 1) non-exhaustion and 2) preemption by the Civil Service Reform Act ["CSRA"]. The appeals court never reached the exhaustion issue, finding that claims were preempted. App.-p.8-9. Petitioner argued claims were proven exhausted by Board documents, and that since claims were pled both under the CSRA and independently of the CSRA, dismissal of independent claims for preemption could not be grounds to dismiss the *same facts* under the "comprehensive" CSRA, absent the absurd view that the CSRA preempts all claims except, arbitrarily, discrimination and whistleblowing. App. 8-9.

The dismissed claims largely pertained to pervasive DOJ harassment reinitiated after the application. 6 USC s. 251. Harassment resulted in significant deprivations of rights like safety and

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Church of Scientology v. US, 506 US 9 (1992) (remedies). Once the complaint was sealed, the case was effectively sealed anyway, and no right-of-access purpose was served. No purpose was served with court complaints about seals either. Eg. 2/17/05-p.7. Unsealing invited more harassment.

livelihood. A prohibited practice, INS charged non-convictions as if to discredit Petitioner's government misconduct allegations filed in a 1/01 suit.[6] The suit precipitated additional reprisals.

Petitioner just moved to Texas.[7] Only the

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[6] As a law clerk in Louisiana, Petitioner scored high in a quality audit, but was harassed by DOJ and others. Petitioner moved to DC in 1995, the judge died, and within weeks Petitioner was arrested. There was no intoxicant present, and no tests were administered. She was unsuccessfully browbeaten about Louisiana. *US v. Guest*, 383 US 745 (1966) (conspiracy against rights, travel). In 1996 in DC, Petitioner photographed an assailant breaking into her window. 2/20/07-App.3-p.35. He was found by police hiding in her closet in his underwear, yet Petitioner was falsely arrested. Charges were dismissed. Petitioner moved to Las Vegas to work for B&A, where tampering occurred. At another firm, a DOJ employee impersonated a client and then showed his badge. Petitioner passed a Census clearance, but received hundreds of federal non-selections, and accordingly sued in 1/01. INS made suitability charges about Virginia, DC, and the firms.

[7] Sealed and dismissed without service, the 1/01 pleadings were leaked. Petitioner was ambushed at federal job interviews. In 4/01, Petitioner was ambushed about the suit at a new temporary job, reported tampering, and was ambushed again days later by the city. A guard, a non-eyewitness, improbably claimed Petitioner was banging her bruise-free head. Records of the seizure to a hospital were expunged. The incident was contemporaneous with the court's loss of a sealed document. INS made charges about the Texas seizure, though Petitioner was never even taken to a magistrate to be charged, Tex.Crim.P. 14.06, and no records existed to compile facts.

government had access to the sealed material that was leaked. An investigator brought a sealed complaint copy to the personal interview. Among other things, unidentified officers appeared at a workplace with a prop B&A bank check. Curiously, passage of a 2002 IRS clearance was misreported. 11/28/05-App.14,21-22,-p.132,174-76.

The investigative time-frame covered the seven years before the 1/02 telephone or written 5/02 application. 11/28/05-App.1. The investigation ended in 10/02, and authorizations expressly ended with the INS rejection in 5/03. 5/5/06-App21-p.57-58. Nevertheless, others were contacted, including new, post-investigation employers. Contact violated the Privacy Act, 5 USC s. 552a(i), which prohibits disclosures to other agencies or the public, and violated CSRA clearances and authorizations. *Mahtesian v. Lee*, 406 F.3d 1131 (9th Cir. 2005) (prohibited practice to reveal background check contents).

Suspicious activities increased after the Board. Again, seals isolated the government as the perpetrator. Among other things, a typo only appearing in the INS application was thought to be the name of a relative who coworkers attributed with false illnesses.[8] 11/28/05-App35-

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[8] Among other things, Petitioner was accosted by firearm with demands for information about Louisiana. 2/3/05-AppB-p.2-4. The full Board appeal was submitted in 1/04.

p.210-11. INS forced uninvolved strangers and remote acquaintances like coworkers on Petitioner using planted misinformation, and malicious ambushes. Some offices were oblivious while others, often new, tampered, among other things. 5 USC s. 2301, 2302(b). Cf. 18 USC ss. 1512-13.

That month, prop letters were planted at a roofing employer. Letters reappeared that summer at another employer, along with men who had a warrant-like document stating "FBI on behalf of INS." Gender-based assault rumors outside of the pleadings were planted within weeks after Petitioner began working in 3/04 at a fundraiser, as noted by third-party affidavits. 8/14/06-App6-p.32. 9/5/06-App.3-p.6. Petitioner recognized INS employees at the fundraiser. INS followed Petitioner to a law office and gynecologist's office where INS counsel called her. The medical authorization had expired. Cf. *MLB v. SLJ*, 519 US 102 (1996) (interference with fundamental family rights).

The appeals court failed to correct courts below. Corruption, DOJ/DHS continued ambushes post-appeal, fully five years after the investigation. New facts, INS counsel writhed about, as corroborated by third-party affidavit, App.-56, and imperiled Petitioner at PCI and another company, indicative of the harassing proceedings and unlawful practices.[9] *NLRB v. Neuhoff*, 375 F2d 372, 376-77 (5th Cir. 1967). *Brown v. Nationsbank*, 188 F.3d 579, 591-92 (5th Cir. 1999).

The actions taken by the courts so far departed from the usual course of judicial proceedings that this Court's supervisory power is needed to correct the determination and restore sound administration to the courts and the civil service.

II. ARGUMENT

FINDINGS OF COURTS BELOW CONFLICT WITH THIS AND OTHER COURTS THAT REQUIRE EXAMINATION OF AN AGENCY'S VIOLATIONS IN ORDER TO CONFORM WITH CONGRESSIONAL INTENT AND TO PREVENT BIZARRE RESULTS

A. Introduction

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[9] Proceedings were marred. The Board transcript was cut and the stenographer gesticulated until the Administrative Judge, ["AJ"], warned her. Among other things, district court transcripts were cut. Stripped, hundreds of court-record pages were refiled at appeal.

This Court has routinely held that under 7701(c) and 7703(c) agency determinations are not sustained where unsupported by evidence, or in violation of law or procedure. Eg., *Cornelious v. Nutt*, 472 US 648, 663 (1985) (harmful errors impact fact-finding or the decision, or prejudice rights).

501's revision caused INS to claim its violations would no longer be considered. The agency's interpretation was faulty in that: 1) it usurps judicial authority and is unsupported by statutory interpretations; and 2) its results were so bizarre that Congress could not have intended it.

B. The Drafting Agency, OPM, Interpreted 501(a) To Include 202(c) Review; And 7701-7703 Show Congressional Intent To Provide Judicial Review

1. Judicial Review Of 202(c) And Violations

501(a) provides in part:

> An individual who has been found unsuitable for employment may appeal the determination to the Merit Systems Protection Board. If the Board finds that one or more charges are supported by a preponderance of the evidence, it shall affirm the determination. If the Board sustains fewer than all the charges, the Board shall remand the case to OPM or the agency to determine whether the action taken is still appropriate based on the sustained charge(s). This determination of

> whether the action taken is appropriate shall be final without any further appeal to the Board.

Lindahl v. OPM, 470 US 768, 779 (1985) evaluated judicial review in civil service disability retirements by examining the language and objectives of the statute, the statutory scheme, the legislative history, and the nature of the action.

INS interpreted 501 to divest judicial review of violations and 202(c). But like the statute in *Lindahl*, 501 is capable of more than one interpretation. Another interpretation is that 501(a) directs a case to a court or an agency, depending on the Board's disposition. The right of review is determined by 7701-7703. *Lindahl*, p. 793. The primary objective of 7701-7703 is adverse actions against employees. *Id.*

Judicial review of agency actions remains until there is persuasive reason to believe Congress dictated otherwise. *Whitman v. DOT*, 547 US 512 (2006). Congress failed to use unambiguous language in 501 to repeal review. *Lindahl*, p. 779-81. Congress also did not impliedly repeal jurisdiction with later statutes. *US v. Fausto*, 484 US 439, 453 (1988). OPM drafted the regulation, not Congress.

If an agency's construction of an act it administers is reasonable, the Court will not disturb that construction. *IRS v. FLRA*, 494 US 922, 928 (1990).

Folio found OPM intended to include not just proof of the facts, but also all factors in 202(c). Id. The CSRA is comprehensive. *Bush*. Disregarding review of violations[10] other than whistleblowing and discrimination is arbitrary and inconsistent with post-501 cases. Eg., *Whitman*. 2302 expressly protects against improper personnel influences.

Accordingly, relevant statutory interpretations show 501 should not have resulted in divestment of review of 202(c) or INS violations.

2. Improper Deference

Section 7703(c) provides:

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[10] There were violations in addition to hearsay, reprisals, changed charges, improper presumptions and non-suitability discrimination. Summaries prevented finding whether employers or INS prompted the Report's regard for marital status. 2302(b)(1)(E). Undocumented procedures were used when INS transitioned to DHS, where an INS employee orally stated OPM passed Petitioner before the INS final decision. Usually OPM delegates decisions, and records are only destroyed after passage. 5 CFR s. 731.103(a), (e). INS summaries were deceptive. 5 USC s. 2302(b)(4). The penalty, disparate, was not reduced after four charges were dismissed. No dishonesty/omission charge was taken against Petitioner. A penalty must be reasonable in terms of the range of punishment and strength of proof -- here, refuted hearsay. *Boylan*, p. 576.

> (c) In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be--
>
> (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> (2) obtained without procedures required by law, rule, or regulation having been followed; or
> (3) unsupported by substantial evidence;
>
> except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

7703 provides for de-novo review of discrimination claims in district court, but it was not applied.

Deference was applied to non-discrimination claims. Deference is appropriate where the agency interpretation is applied consistently, but a detraction when not. *Gose v. USPS*, 451 F.3d 831, 837 (Fed. Cir. 2006). The 5th Circuit has no published 7703 cases after 1984 using the district court's deference construction to "not reweigh," or substitute its judgment "even if this court finds that the evidence preponderates against the

MSPB."[11] 8/2/06-p.7, citing *Warncke v. Harris*, 619 F.2d 412, 416 (5th Cir. 1980), which predates *Lindahl*.

When the full Board reviews an AJ, "the MSPB is free to re-weigh the evidence and substitute its own decision as to the facts or the law commensurate with the substantial evidence standard, . . . but it cannot substitute its judgment on issues of credibility based on the demeanor of witnesses." *Haebe v. DOJ*, 288 F.3d 1288, 1302 (2002).

Cursory contentions that deference is required for non-discrimination claims is non-responsive. App.-p.12, The court's standard was dormant and inconsistent with the deference language in 7703.

The language of 7703 includes a discrimination provision, unlike 5 USC s. 706. 7703(c)'s deference standard entails a district court "review" of the record to "set aside" findings without substantial evidence or in violation of law or procedure. *Mitchell*, p. 1495-96. MSPB's taped message to Petitioner proved the record was never ordered for review. Among other things, the AJ failed to consider relevant factors like 202(c). The courts misunderstood Virginia, showing lack of fact awareness, *Haebe* p. 1303,

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[11] See *Bonet v. USPS*, 712 F.2d 213, 216 (5thCir. 1983) (former standard).

and charges were impermissibly changed. The no-cause termination was corroborated with additional district court documents from the employer. 5/5/06-App10. Because the two charges are under separate 202(b) categories, reversal of either would change the outcome under 501(a). However, the courts viewed facts in isolation to substantiate one side while ignoring contradictory evidence, and courts ruled in favor of a grossly inadequate case under any standard. *Universal Camera v. NLRB*, 340 US 474 (1951).

The language of 7703 does not show that Congress intended to strip de-novo review for non-discrimination claims in *all instances*. *Lindahl*, p. 798, held that de-novo review was appropriate where additional fact-finding was necessary. In this case, there were new post-proceeding facts and new discovery. Where all claims share facts, de-novo review is required for all claims. Cf. *Gomez*, p. 860 (discrimination and non-discrimination claims often share facts and are not bifurcated). Also, the agency's hearsay evidence should be discarded, which would essentially result in de-novo review.

C. Results Of INS Statutory Interpretation Were Bizarre

The INS interpretation was inconsistent with OPM. As stated, statutory interpretations cannot be so bizarre that Congress would not have intended it, and an agency's interpretation of regulations

must be reasonable. *IRS v. FLRA* p. 928.

Divestment is bizarre in that 1) INS escapes its burden of proof; 2) *McDonnell Douglas* is evaded by disregard of 202(c) factors that determine the personnel action's appropriateness; 3) INS causes recurrent penalties; 4) INS restricts the CSRA's comprehensiveness; and 5) agency violations go unchecked and essential prongs of prohibited practice claims are disregarded.

1. INS Escapes Burden Of Proof

INS has the burden of proving the civil service charges. 5 USC s. 7701(c)(1)(B). However, 501 unreasonably permitted circumvention of standard means that invalidate agency evidence. In turn, the courts below were not rational triers-of-fact.

Under 501(a), INS was not required to introduce admissible evidence. The only INS evidence was hearsay Report summaries. Documents were not obtained, attached or retained. 5 CFR s. 731.103(e). Johnson's assessment was also invalid since it relied on summarized interviews and summar ed documents that were not presented, authenticated, or shown trustworthy. *US v. Wells*, 262 F.3d 455 (5th Cir. 2001).

As explained, an investigator testified that interviewees, largely strangers and short-term employers, were asked to provide factual accounts of what they overheard, and to

provide lay medical information, all without personal knowledge. 5 USC s. 2302(b)(2). Fed.R.Evid. 602, 701, 801(c).

The hearsay was not submitted under circumstances showing credence.[12] *Jackson v. US*, 428 F.2d 844, 847 (Ct.Cl. 1970). Hearsay is accorded low probative value. Id. In *DOJ v. Jordan*, MSPB No. BN0710101661 (2002) the AJ found

> the report was mostly double hearsay, the name of the investigator who summarized the statements of the witnesses was not provided, the report contained no statements sworn or otherwise from witnesses, the agency offered no explanation as to why it did not obtain

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[12] Inconsistent evidentiary standards were applied to parties. INS' hearsay was admitted. INS should have been judicially estopped from objections to Petitioner's streamlined discovery that was proposed for depositions upon sworn and written questions without an officer. Fed.R.Civ.P. 31. Depositions may be taken in any manner. Fed.R.Civ.P. 29. *Saverson v. Levitt*, 162 FRD 407, 408-10 (DDC 1995). App.-p.29.

An abuse of discretion, discovery was denied without reason or arbitrarily. *Wiwa v. Petroleum Dutch*, 392 F.3d 812, 819 (5thCir. 2004). In addition to discrimination discovery in nn. 15, 27, the court should have compelled responses for information collected by investigators, and about specific reprisal information like the warrant-like document in n. 8.

> signed statements during the investigation, and the summarized information provided by the witnesses was inconsistent.

The Report was the same in this case. There was no evidence that someone other than investigators made allegations. Petitioner did not make or adopt her summary that INS used despite the availability of testimony. Employers who swore they never met or only vaguely recalled Petitioner did not likely make specific, critical Report remarks. 11/28/05-App14,15,17-p.137,141-42,147-48,152-55. The Report was discredited. Id. p. 4-6.

Sworn discovery responses of purported interviewees showed certain interviews *never occurred*, and summaries were impeached with employment records. The Report violated regulations about accuracy and deception. 5 CFR s. 731.103(e). 5 USC s. 2302(b)(4).

Documentary evidence showed the B&A termination was no-cause. The INS notice letter alleged resignation in lieu of a termination for "personality" allegations of tirades and mistrust in government. App.-51. The application says "fired," among choices of quit prior to being fired, left by agreement following misconduct allegations, left for unsatisfactory performance or other reasons under unfavorable circumstances. 11/8/05-App.1-p.16.

Thus, the application was not an admission to

disqualifying conduct. The investigation was conducted post-application to determine relevance to suitability. To be relevant under 202(b), a termination had to be for misconduct or negligence. Employment records impeached INS hearsay. As explained, records conclusively showed the employer affirmatively withdrew his inaccurate termination letter about other issues pursuant to Nev.Rev.Stat. 613.075(6) and sent corrections to the Nevada Labor Commission. There was never a resignation letter. INS admitted records never contained "personality" allegations. 11/28/05-App.9-p.112. *Santiago-Ramos v. Centennial*, 217 F.3d 46, 56 (1st Cir. 2000) (absence of reprimands in personnel record shows pretext).

INS was prohibited from finding a cause where the employer had none. *Watson v. USPS*, 13 MSPR 56 (1982). As explained, the courts and agency impermissibly changed charges. *Greenspan*. p. 1305. INS failed to prove every element. Id. Though INS corrected its false allegation that Petitioner admitted intoxication, the Board re-alleged it.[13]

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[13] The Board was unclear about charges and what was proven. As stated, INS gave the impression of doubled charges by alleging convictions under Fairfax County Code 5-1-1 and Va. Code 18.2-388. The charge was 5-1-1, the lowest level misdemeanor in Virginia which cannot impose jail time. Va. Code 18.2-9, 18.2-11. 4/8/05-App.7-p.16. The Board falsely alleged Petitioner "disclosed that she was intoxicated and out in the street with no shoes."

In summary, standard evidentiary rules were suspended under 501. The non-witness, summarized hearsay had low probative value, while Petitioner's documentary evidence was admissible. *Jackson,* p. 847. Bizarre evidence rulings plagued the case, including recusals.[14]

Board p. 8. There would be no Virginia trials with admissions. Allegations were corrected by the INS 5/03 decision letter, stating "you did not admit that you were intoxicated." App.-p.55. Arguably untimely, Virginia occurred about seven years before the seven-year application.

[14] An administrative complaint was filed for the court's loss of sealed documents. 12/13/04-AppA,p.1-2. There was a contemporaneous 4/01 seizure. The extrajudicial facts followed the magistrate's dismissal of the 1/01 case. Complaints against a court warrant recusals. *US* v. *Anderson,* 160 F.3d 231 (5th Cir. 1998).

A 28 USC s. 455 recusal was also warranted for the clerk. She was an assistant city attorney assigned to Petitioner's claim for the 4/01 seizure. Biased, her disposition was determined by her job, and she accessed expunged, privileged material. Participation as a government lawyer mandates recusal as judicial staff whether or not she wrote the opinion. *US v. Gipson,* 835 F.2d 1323, 1325 (10th Cir. 1988) (455(b) mandates recusals).

The 4/01 matter is pertinent to unlawful charging of non-convictions and Petitioner's claims of reprisals, and pretext. The appeals court falsely asserted there were 28 USC s. 144 motions, that 4/01 was irrelevant, and that the clerk needed first-hand knowledge for recusal. App.-p.31 She was on the case. Her 6/19/01 city letter states "[e]nclosed is the . . . Incident Report . . . A decision on your claim will be made after I meet with the officers." 2/24/06-App.2-p.3.

App.-30-31. Testimony was not even regarded as evidence. Eg. App.-p.15, 33 (OPM clearance and transcripts). Petitioner's arguments were often mis-stated. 9/27/07-p.14,n.36.

2. INS Evades *McDonnell Douglas* And 202(c), Which Determine Charges' Relevancy

Suitability proceedings are reserved for best-qualified applicants. 5 CFR s. 731.103(d). 202(c) determines the charge's relevance, and guards against unjustifiable disqualifications and cumulative burdens.

Section 202(c) is consistent with *McDonnell Douglas*, p. 806, which prohibits exclusions of applicants based on "a testing device which overstates what is necessary for competent performance, or through some sweeping disqualification of all those with any past record of unlawful behavior, however remote, insubstantial, or unrelated to applicant's personal qualifications."

501 unreasonably caused an unsuitability finding by omitting 202(c) factors. Factors include charges' recency and seriousness, circumstances, societal conditions, rehabilitation, and the nature of the position. Under 202(c), incidents greater than three years are considered old, and non-recurrence in three years establishes rehabilitation. *Matter of Spielman*, MSPB 10 (1979). Charges were over three years.

Charges were not categorized as just-cause for unsuitability. OPM's "Suitability Referral Chart" categorizes as de-minimus employment personality conflicts and minor alcohol infractions, and OPM only refers such issues for investigation when three occur in three years.[15] 11/28/05App.24-p.180-81. Application materials only expressly prohibited applicants with domestic violence convictions, which did not apply. 7/17/06-App.6-p.18. Johnson testified that any conviction disqualified applicants but if true, applicants would be eliminated before the test or investigation. 8/14/06-App.1-p.3.

The entry-level position is not remarkable. Petitioner already held higher-level public trust positions. 5 CFR s. 731.106(b). A fallacy, nothing precluded Petitioner from having a weapon.

Under 202(c), circumstances demonstrated that charges, in addition to being non-disqualifying, were not well-grounded. Employment records show the employer never alleged the personality allegations and he affirmatively withdrew his own. In Virginia, there were no intoxication tests, intoxicants at the scene, confessions, police reports or lists of facts or witnesses. *US v. Brown*, p. 591 n. 3. *Sundance v. Municipal Court*, 729 P.2d

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[15] Discovery was not compelled to show INS hiring of similarly-situated persons with convictions or terminations, though names could be excerpted for privacy. *McDonnell Douglas*, p. 804. Regardless of production, OPM standards demonstrate they should have been hired.

80, 87 (1986) (insufficient documentation to support government witness recollection). Petitioner was not taken home as stated, but to Virginia, where she was arrested while sitting on a curb waiting for a taxi stopping at incorrect addresses, and held to be intoxicated for no shoes. The incident did not warrant the $10 fine in Virginia or the agency's unsuitability finding. There were no allegations of affected speech or movement -- a requirement for such cases in Virginia. *US v. Brown*, p. 597. The statute was vague, required no intoxication level, encouraged unbridled discretion, and tied lawful speech to acts. *Hill v. Houston*, 789 F2d 1103, 1113 (5th Cir. 1986) (overbreadth; not a "crime to curse or use opprobrious language"). INS should not have pursued the charge where no tape or transcript was made for a fair appeal. *Rosa* (reversal for no transcript).

Societal conditions under 202(c) showed the arrest was suspicious, occurring weeks after the judge Petitioner worked for died. Timing shows pretext and improper motive. *Fuentes v. Perskie*, 32 F.3d 759, 766 (3rd Cir. 1994). *Culver v. Gorman & Co.*, 416 F3d 540, 546 (7th Cir. 2005). The Virginia appeal ended in a hung jury after Petitioner was badgered about the Louisiana office and threatened by weapon. *Ammons v. Baldwin*, 705 F.2d 1445 (5th Cir. 1983) (threats of imminent violence). *Brown v. Texas*, 443 US 47 (1979) (arbitrariness). *Steffel v. Thompson*, 415 US 452 (1974) (harassment). Undue under the 5th Amendment, retrial resulted in a $75 fine. Internal

affairs investigated. 11/28/05-App.12-p.122. Tampering also interfered with employment.

Additional societal conditions involved false government records that obstructed employment. The records were of 1) failing scores for a federal test never taken; 10/24/05-App.8,p.35-39; 2) a non-existent prison guard with Petitioner's name; 5/5/06-App3,17-p.6,53; and 3) an investigation of Petitioner in 1988 that actually pertained to a former employer. 10/24/05-App.7-p.14-34. 5 USC s. 552a(i) (criminal liability for government's false Privacy Act indices).

In short, 501 caused unreasonable disregard for factors determining just-cause and relevance.

3. Revision Causes Recurrent Penalties

Suitability evaluates past convictions or post-employment, post-application criminal allegations. As explained, pre-application non-pending, non-convictions (dismissals) should not have been charges under 2302(b)(10).

501's omission of 202(c) factors violated prohibitions against double jeopardy and ex-post-facto. When dismissed charges are reviewed by agencies without 202(c) factors, the agency charge is the same as initially brought, violating laws against recurrent penalties. Eg., *Hudson v. US*, 522 US 93 (1997) (double jeopardy). Ex-post-facto, 501(a) aggravates the punishment and exacts it with lesser testimony and altered

evidence rules -- in this case hearsay and the preponderance standard. *Stogner v. California*, 539 US 607 (2003) (vindictive revival of prosecutions).

4. Revision Unreasonably Limits CSRA's Comprehensiveness

As explained, CSRA and other violations were disregarded because 501 merely requires proof of the charge.

Various other Petitioner claims/INS violations were dismissed on 6/13/06 by Fed.R.Civ.P. 12(b)(1). Despite the agency's assertions to the contrary, Petitioner's claims were exhausted[16] and not

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[16] Board documents prove exhaustion. 2/23/05-App.1-7-p.1-19. 6/27/05-App.5-p.12-13. Dismissed claims largely pertained to harassment, and included post-Board acts. Petitioner was in litigation during post-Board occurrences, so obviously no FTCA claim was filed prior to litigation. 28 USC s. 2675. New facts growing from charges and occurring during an appeal's pendency are cognizable *without* exhaustion. *NAGE v. Publ. Serv. Bd.*, 40 F3d 698, 711-12 (5th Cir. 1994). See also, Fed.R.Civ.P. 15(c) (same conduct, transaction). 5 CFR s. 1201.115(d)(1). Independent constitutional claims *do not* require FTCA exhaustion. *Bush* p. 377 (FTCA tort and constitutional claims are complementary). Other independent claims were exhausted when facts and damages were enumerated in pleadings, *Blue v. US*, 567 F.Supp. 394 (DDC 1983), just as discrimination claims may be filed with EEOC or directly with the Board. *Valentine-Johnson v. Roche*, 386 F.3d 800, 805 (6th Cir. 2004). Redundant with *Blue* pleadings, Petitioner filed an FTCA claim post-dismissal, but

preempted by the CSRA.

The facts were pled *both* independently and under the CSRA. Fed.R.Civ.P. 8 (alternative pleading).[17] Independent claims are cognizable in CSRA cases where facts are not personnel actions. *Bush*, p. 385, n. 28 (eg., warrantless searches). The complaint's interpretation could not be limited to independent claims.[18] Thus, when independent claims were dismissed, facts still should have been heard under the CSRA, but were unreasonably disregarded, impliedly by the same bizarre 501 limitations that were applied to CSRA violations like changed charges. Eg., nn. 2-4. Clearly, 2301, 2302(b), 7701 and 7703 contemplate inclusion of facts as part of the

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amendments were refused. Facts flowing from charges, like long-standing DOJ harassment were exhausted and never dismissed.

[17] Some cases dismiss independent claims when they collaterally review unavailable CSRA claims. *Lee* v. *Geren*, 480 F.Supp. 198 (D.C. Cir. 2007). In this case, claims were pled simultaneously, properly invoking 1) the CSRA and 2) independent claims for any non-personnel facts falling outside the CSRA.

[18] CSRA regulations were expressly included in the same claim as dismissed independent claims, exemplifying alternative pleading: "Claims for Relief: Due Process Deprivations and/or Failure to Adhere to Regulatory . . . " Petitioner also reincorporated throughout the complaint. Facts, not claim captions are controlling. *Watkins v. Lujan*, 922 F2d 261, 265 (5th Cir. 1991).

"exhaustive" CSRA.[19] *Whitman. Bush*, p. 385-86 ("[c]onstitutional challenges ... such as the First Amendment claims ... are fully cognizable within this [CSRA] system.") Clarifying amendments were denied without justifying reason,[20] or

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[19] The same facts of the dismissed independent claims were cognizable under the CSRA. The CSRA is comprehensive, incorporating privacy and constitutional rights. 5 USC ss. 2301(b)(2) 9701(f)(2)(B)(i). The accuracy and fairness language in the Privacy Act, 552a(g)(1)(C), is similar to the CSRA at 5 CFR s. 731.103(e)(1). The CSRA incorporates torts. 5 CFR ss 731.103, 731.202(b)(1). Also, claims were based on regulations, so their violation was evidence of negligence. *Lowe*, v. *General Motors*, 624 F2d 1373, 1379-81 (5thCir. 1980). Individuals were added by amendment, but the notion they were necessary for certain constitutional claims makes the CSRA the same as independent claims. Facts that are prohibited practices or unfair treatment require no individuals.

[20] The appeals court agreed that the initial amendment, which added individual defendants, 2/20/07-App.5, should have been filed, but the district court refused leave for other amendments. App.-p.26-27. Leave to file should be freely given. Fed.R.Civ.P. 15(a). An abuse of discretion, no justifying reason was given. *Foman* v. *Davis*, 371 US 178 (1962). The same reasons could not be used to dismiss all amendments since amendments added parties, clarified alternative pleading, and showed FTCA exhaustion. 2/15/06. Sua sponte appeals court vagueness concerns were untrue representations of documents. 9/27/07-p.10-11. App.-28 Furthermore, there was already an administrative proceeding. *Castillo* v. *Norton*, 219 FRD 155, 163 (D.Ariz. 2003) (complaint defined during litigation). The third amendment was delayed by INS' non-responsiveness to discovery. 9/2/05. 10/24/05. 4/4/07-Replyp.24-25.

unreasonably.[21]

5. Revision Insulates INS From Adherence To Laws And Procedure

Notwithstanding proof of charges, agency determinations are not sustained when based on legal and procedural violations. 5 USC ss. 7701(c)-7703(c). Under 501, the Board disregarded violations. The Board examined only whistleblowing, discrimination and due process, but as a bizarre consequence of 501(a), essential prongs of claims were disregarded because they relied on 202(c) factors and agency violations.

a. Disparate Treatment

Disparate treatment claims establish a discriminatory intent by inference. For a prima facie case, the plaintiff shows similarly-qualified persons outside the plaintiff's protected groups were hired. *Watson v. Forth Worth Bank*, 487 US 977, 986 (1988).

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[21] Court records document the filing of the second amendment by a clerk's note on a 7/25/05 PACER copy stating, "orig. copy of second Amended Compl. to Judge." Copies of missing document court stamps were filed. 8/14/06-App.2-p.18-21. The court was also on notice from subsequent pleadings. Eg., 3/8/06-Summons. Dismissals based on incomplete records can be vacated. *In re GHR*, 791 F.2d 1200, 1202 (5th Cir. 1986). The record was supplemented on appeal and should have been considered. Id.

501(a) caused disregard for de-novo review, pretext and timely Board discovery. Once produced at district court, discovery of hirees was disregarded. The court, quoting a *pre-discovery* deposition,[22] 8/2/06-p.14, found no evidence of hirees outside the protected classes of black, female and disabled. App.-p.19.

However, the prima facie case was no longer a disputed fact. Petitioner attached the new district court discovery showing hiring of non-blacks and males. 11/28/05App.40-p.218-220. 5/5/06App.23-p.61-62. 6/8/06-App.3,4-p.12-17. 7/17/06-App.2,3,5-p.1-17,19-21. INS was compelled on 2/23/06. Supplemental pleadings were ordered on 6/23/06. INS stipulated on 5/11/06 that no disabled persons were hired. There would be no disparate impact statistics were there no evidence. The courts knew or should have known. 18 USC s. 242.

Once the prima facie case is established, and the employer shows legitimate, non-discriminatory reasons, the plaintiff shows reasons were pretexts, and discrimination was more likely a real reason. *St. Mary's Honor Ctr. v. Hicks*, 509 US 502 (1993).

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[22] Improper, the deposition was largely duplicative of Board testimony. Fed.R.Civ.P. 30(a)(2)(B). Cut transcripts and INS misconduct also should have precluded a cost award. *Reuther v. Smith*, LEXIS 16494, *5 (E.D.La. 2003). App.-p.33.

By omitting 202(c) and violations, reasons were found legitimate and non-pretextual. However, competent evidence included the Report and documents impeaching it, and testimony and signed writings that raised genuine disputed facts inappropriate for summary judgment. Fed.R.Civ.P. 56(c).

Petitioner's 202(c) and violation arguments showed pretext by illuminating agency inconsistencies, incoherence, weaknesses and fallacies. *Santiago-Ramos*, p. 56. For instance, INS lost four of six charges at the Board.

> If . . . the plaintiff manages to cast substantial doubt on a fair number of them, the plaintiff may not need to discredit the remainder. That is because the factfinder's rejection of some of the defendant's proffered reasons may impede the employer's credibility seriously enough so that a factfinder may rationally disbelieve the remaining proffered reasons, even if no evidence undermining those remaining rationales in particular is available.

Fuentes, p. 764 n. 7. Incredible employer reasons/practices are one type of circumstantial evidence probative of discrimination. *Desert Palace* p. 100.

Pretextual, INS instituted a facially non-neutral medical standard. 5 USC s. 2302(b)(1)(D). As explained, an investigator testified that medical

testimony was solicited from lay interviewees for all applicants. 8/14/06-App.1-p.14. They also had no personal knowledge. The medical inquiry must be segregated from the character investigation, and medical experts were required. 42 USC s. 12112(d). 5 CFR ss. 339.104, 731.101(a). 29 CFR s. 1630.14(b). *Lanier v. Sallas*, 777 F.2d 321, 324 (5th Cir. 1985). *EEOC v. Manville*, 27 F.3d 1089, 1094 (5th Cir. 1994) (pattern of discriminatory comments shows motive). Improper report content prejudiced the application whether or not found disabled. *Lutz*. False, *any* conviction was not disqualifying. Other violations showing pretext were disregarded such as vacillating charges, wrong presumptions and invalid hearsay.

Employer reasons need not be false to be pretexts. *Rountree v. Johanns*, 382 F.Supp.2d 19, 26 (DDC 2005). So even if believed, charges were frivolous under 202(c), and non-disqualifying under agency criteria.

Discrimination need only be a contributing, not sole, factor. 42 USC s. 2000e2(m). Direct evidence of a discriminatory motive is not required. *Desert Palace*. The discriminatory inference was supported with under-representation of protected groups. Hearsay and subjective methods permitted stereotyping such as non-feminine aggressiveness. *Price Waterhouse v. Hopkins*, 490 US 228, 235-36 (1989). False, Johnson testified that hiring was color-blind and females were hired equally. 8/14/06-App.1-

p.7,10. An investigator stereotyped races of associates. App.-p.18. INS harassed Petitioner at a gynecologist and planted gender-based rumors. INS discovery responses suspiciously showed only Texans obtained language awards for other positions. 7/17/06-App.8-p.24-25. Language criteria interjected race into hiring. Language is taught post-hiring, but INS overweighed criteria pre-hiring with its vacancy announcement preference. Also, pervasive reprisals continued because of race, working for a black judge and in retaliation for suing. Medical violations were overwhelming direct evidence that disability was a factor. Johnson insisted Petitioner failed the medical despite INS' 9/19/02 document stating "YOUR STATUS IS Medically Qualified." 11/8/05-App.4-p.38. 11/28/05-App.3-p.5.

In sum, 501 caused disregard for evidence and essential prongs of the claim. The appeals court failed to correct the determination, though de-novo review of discrimination and summary judgment orders is required. App.-p.10.

b. Disparate Impact

Disparate impact claims show employment practices are responsible for statistical disparities. Evidence focuses on "competing explanations for those disparities." *Watson* p. 987. Substantial disparities raise an inference of causation and establish a prima facie case. Id. p. 994-95.

The court claimed Petitioner's statistical analysis was incorrect because the comparison relied on a general applicant pool rather than special-skills applicant pool of craftsmen or licencees. App.-p.22. The court raised the argument sua sponte in the final judgment, relying on the GS-11 job description for the GS-5-7 position.

However, application materials state INS hired "general experience" applicants for the entry-level position.[23] Accordingly, the comparison was between the percent of blacks, women and disabled persons hired, compared to their percent in the general applicant pool in the labor market. *Johnson v. Transportation Agency*, 480 US 616, 651 (1987).

Disparities were substantial.[24] Eg., 8/2/06-p.18. Extraordinary, zero disabled or biracial persons were hired, and nearly half the blacks and

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[23] An application document states, "[t]o qualify for the position, you must have three years of general experience" . . ."If you do not have the work experience" a college degree. 8/14/05App.5-p.29.

[24] Zero is an egregious disparity, *Johnson* p. 636. *Hazelwood School District v. US*, 433 US 299, 311 (1977), found that a disparity between 3.7% hired and 5.7% population weakened other discrimination proof, while a disparity of 3.7% hired and 15.4% population was large enough to reinforce discrimination claims. See also 29 CFR s. 1607.4(D) (test for selection rate that shows adverse impact).

women that could have been hired were not.[25]

By using 501 to omit consideration of 202(c) and violations, the courts failed to analyze the business practices. The court held that investigations per-se were necessary business practices. App.-p.21-22. Petitioner enumerates practices, not INS. *Watson*, p. 994. The investigation per-se was not questioned, rather specific, enumerated business practices. Overweighing the foreign language preference impacted race. Impeached hearsay, non-perception testimony, breached medical standards, vascillating charges, undocumented procedures, improper presumptions, and non-suitability discrimination caused falsification and stereotyping.[26]

Causation is determined by significant disparities.

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[25] In Texas, 66 females, 11 blacks and 147 hispanics were hired out of 233 total hires in 2002. 7/17/06-App.3,5,6-p.12-17,19-21. The national and Texas population of blacks is 12%, but in 2002, hirees in Texas were 5%. Nationally black inspector employees were between 3-7% from 2001-2003. Women hirees were 28% in Texas in 2002 and inspector employees were 21-23% nationally from 2001-2003. Id. INS produced no justification, such as affirmative action, for the 32% Texas hispanic population and 63% Texas hiring in 2002. Id. *Johnson* p. 626.

[26] Violations permitted falsification and/or were non-neutral, so disparate impact and treatment claims involved issues that were not mutually exclusive.

Watson, p. 995. Violations allowing false medical and character evidence are self-explanatory causes. INS would have difficulty disproving causation since the practices are illegal. 29 CFR 1607.6(A) (non-validated selection procedures and lawfulness requirement).

Once the prima facie case is made, the employer shows that practices are justifiable and necessary. *Watson*, p. 998. The plaintiff then shows the practices were pretexts and that other practices would serve the employer. Id. Obviously, illegal practices could not be justified. Nothing prevented INS from collecting signed statements and perception testimony, and following regulations.[27]

In sum, Petitioner's statistics were correct. INS adopted practices disproportionately affecting protected classes, but an unreasonable consequence of 501, practices were not considered, rendering such claims meaningless.

c. Disability

501 caused disregard for disability regulations.

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[27] Causal links were clear because of the nature of procedures and their illegality. INS complaints about causal links were frivolous. INS discovery responses about when applicants were eliminated was indecipherable, and should have been supplemented with class, age and education data. 7/17/06-App.1-p.1-9.

First, regulations do not require disability or exhaustion for disability retaliation claims. 42 USC ss. 12188, 12203.

Second, persons are disabled where there is a record, or "regarded as" disabled where others wrongly consider someone to be disabled. 42 USC 12102(B), (C). The court disregarded violations that were direct evidence of disability and disability's contribution to the personnel action. Lay testimony was solicited that resulted in a phony disability record.[28] The INS Report

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[28] The Report discussed inability to learn like mind wandering, day-dreaming, fixations, inability to multitask or grasp concepts, and immersion in minutia. Other comments included: "socially withdrawn," "verbal strike," "unsuited to federal employment," "difficult to supervise," "withdrawn, confrontational," "disheveled," "disturbed," "psychological condition did not permit her to work" "paranoid schizophrenic", "could function when medicated, however she often refused to take her medication," "extremely odd," "asocial, and demonstrated aggressive distaste for her co-workers," "very depressed," "hermit," "collected thrift-store stuffed animals and would hold conversations with them" "could not trust men," forced to leave the employment as a result of health." 2/20/07-App.8 (11/28/05-App.14).

Commentators were largely strangers/short-term employers who had no insurance or other reasonable basis for their patently false assertions. Johnson's affidavit adopted the remarks, stating Petitioner could not learn from mistakes, was alarming, extreme, aggressive, untrustworthy, in-alert and mentally unstable.

chronicles a substantially limiting, long-term impairment affecting learning and working. 29 CFR s. 1630.2, covering the seven years of the report, and numerous employers in numerous industries.

The decision was based on all six claims, including the 4/01 and DC non-convictions that implicated disability. Johnson concluded Petitioner was "violent," making her unemployable for a broad range of jobs, not one job. 11/8/05-App.4-p.39. He falsely claimed medical-exam failure, and criticized the number of jobs/employability, though jobs were largely temporary. 8/14/06-App.1-p.6. He testified that "her condition caused those instances with the police."[29] Id. p. 3. The Board added that B&A did not need to be doctors to find a pet at work inappropriate. Board p. 4.

Thus, when evidence rules and violations are considered, "regarded as" disability is clear.

d. Accommodations

The accommodations claim was based on violations that again were not considered.

Employers must accommodate disabled

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[29] No convictions or medical exam failure support the comments. The belief that the mentally ill are inherently dangerous is discrimination. *Newberry v. E. Tex. State University*, 161 F.3d 276, 279 (5th Cir 1998).

employees unless accommodation imposes undue hardship. 42 USC s. 12112(b)(5), (6). The court found employers must know of the limitation. App.-p.26. Clearly, the Report, accommodations claims and violation complaints were notice. Board p. 10-11.

Cases were cited to show no duty exists to accommodate perceived disabilities. However, cases were inapplicable to instances of discriminatory hiring structures. 42 USC s. 12112(6). An accommodation for perceived disability cases is regulatory compliance, including modifications to the "applications process" and "policies." 42 USC 12111(9). 29 CFR s. 1630.2(o)(i). Accordingly, INS was obliged, regardless of suit, to cease in its violations like soliciting lay testimony.

e. Whistleblowing

Agencies are prohibited from taking adverse actions against applicants who make protected disclosures about violations of law, abuse of authority, or other matters. 5 USC s. 2302(b)(8). Factfinders need not believe disclosures, only that they contributed to the action. *Randel v. Navy*, 157 F.3d 392, 395 (5th Cir. 1998). The motive need not be retaliatory to be a contributing factor. *Marano v. DOJ*, 2 F3d 1137, 1140 (Fed. Cir. 1993).

Applicants may demonstrate disclosures contributed to the action through circumstantial

evidence that 1) the deciding official knew of disclosures, and 2) the timing of the personnel action taken *or to be taken* would lead a reasonable person to conclude that disclosures were a contributing factor. *Horton v. Navy*, 66 F.3d 279, 283-84 (Fed. Cir. 1995). 5 USC s. 1221(e).

First, 501 unpredictably suspended evidentiary standards, leading to improper resolution of the prima facie case. App.-p.15. Johnson knew of disclosures. The 5/02 INS application stated multiple parties were sued. An investigator brought a sealed 2001 complaint copy to Petitioner's interview. The Report, completed in 10/02, stated parties were sued in Louisiana, but claimed no other knowledge of the suit. INS sent a show cause letter in 12/02. Charges unlawfully included non-convictions that were the subject of disclosures. Petitioner's 2/03 Response to INS included both disclosures about the suit, and direct disclosures to INS about government misconduct. Petitioner contacted an INS employee who said she passed an OPM clearance, and that INS would then decide. Johnson's affidavit swore he made the "final decision" and he read the Response. 11/8/05-App.4-p.29-30. In 5/03, the decision found Petitioner unsuitable.

Specious, the appeals court found Petitioner's Response only referred to a sealed complaint without identifying any defendants. App.-p.15. The Response sufficiently identified defendants as

federal.[30] A more specific identification would merely strengthen the motive.

Reliance on references to the suit alone was misguided. Disclosures are protected regardless of the suit. 5 USC ss. 2302(b)(8), (9).

INS knew Petitioner wrote to the Solicitor about a federal suit and harassment. The Response discusses protected disclosures to the Attorney General and others about misconduct.[31] *Serrao*

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[30] The 2/03 Response attached a 11/5/02 letter to the Solicitor stating, "[u]nlike the federal defendants, private defendants did not participate in the pre-suit administrative claim process . . . post-dismissal harassment . . . FTCA claim of the post-dismissal obstruction of justice, those federal defendants . . ." 11/28/05-App.5-p.81-82.

[31] The Response stated, "[i]n immigration court, one judge frequently commented to the courtroom audience that if they were getting services from [firm] it was a disservice. The firm complained to the court." . . . "City employees . . . habitually responded to . . . conclusory reports at the hotel . . . The unlawful April 2001 seizure took place shortly after I filed a sealed civil complaint . . . in January 2001. . . . I heard banging on my door and the federal officer told me that it was the fire department. . . . A motion I filed on April 4, 2001 was missing . . . It is a crime to tamper . . . I was being intimidated, and . . . the sealed record was illegally distributed. . . . I complained to the US Attorney General, and a few days later, the April fire department incident occurred." "[T]he low-level, Virginia state court held no jurisdiction over . . . a Louisiana court . . . abuse of process . . . arrest . . . on the heals of the death of the judge who employed me." 11/8/05-App.6. The 2/03 Personal Statement also discussed the false government records of

v. *MSPB*, 95 F.3d 1569, 1576 (Fed. Cir. 1996) (disclosures made in both grievance proceedings and to others). The 5/03 unfavorable decision followed.

Both prongs of 1221(e) were satisfied by the Response alone,[32] and the prima facie case was established. *Horton* p. 284.

Once the prima facie case is made, the agency shows by clear and convincing evidence that the determination would still be made absent the disclosures. Id.

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a 1988 investigation.

[32] The appeals court denied there was evidence of an OPM clearance or that an investigator had a complaint copy. App.-p.15-16. Petitioner's sworn submissions and testimony are evidence. None of the materials from the investigation were retained as required under 731.103(e) when a clearance is failed, supporting the INS employee's clearance statement. Because investigators drafted the report, they had sufficient influence on the decisionmaker. *Santiago-Ramos* p. 55. Whether or not testimony about the OPM clearance and the complaint copy are believed, the Response alone sufficiently demonstrated Johnson's awareness.

INS concealed from Petitioner the identities of some investigators. INS was not ordered to identify them though their credibility was in issue and discovery was needed. The sua sponte concerns about a particular investigator's name was irrelevant and inaccurate. Both parties knew her name. 11/28/05-App.34-p.208.

Whether the agency would take the same action depends on 1) the strength of agency reasons when whistleblowing is excluded, 2) the strength of a motive and 3) any evidence of a similar action against similarly-situated employees for the non-whisleblowing aspect. *Greenspan*, p. 1303.

INS refused discovery about similarly-situated employees, but OPM's standards show charges were non-disqualifying and similarly-situated applicants should have been hired. The existence and strength of the motive to retaliate for suing is clear. *Jackson* v. US (whether discharged for suing). 501 blocked evaluation of the strength of agency claims by precluding review of agency violations, but as explained, charges are not sustainable when 202(c) factors and violations are considered.[33]

Finally, 2301's fair competition, retaliation and coercion provisions do not have the requirements of 1221.

In sum, 501's disregard for evidence standards and violations undermined the claim.

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[33] Furthermore, Johnson stated he based his decision on the whole person, including non-convictions and non-charged employers. 8/14/06-App.1-p.3. 11/8/05-App.4. Since these facts and charged facts were facts of her protected disclosures, the decision would not have been made without the disclosures.

CONCLUSION

Revisions to 501 unjustifiably curtailed judicial review and had unreasonable consequences. The determination was arbitrary, meaningless, and unsupported by fair procedures. Certiorari should be granted because of the compelling need to resolve court conflicts, and to restore proper administration to DOJ/DHS, the courts and civil service.

Respectfully Submitted April 14, 2008,

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APPENDIX

Fifth Circuit Judgment of 8/16/07 . . . App. 1

US Merit Systems Protection Board Dallas Division Initial Order of 12/17/03 (Sealed) . . . App. 34

Fifth Circuit Rehearing Order of 1/16/08 . . App. 35

5 USC s. 2301 . . . App. 37

5 USC s. 2302 . . . App. 40

5 CFR s. 731.202 . . . App. 49

5 USC s. 7701(c) . . . App. 51

Fairfax County Code Section 5-1-1 . . . App. 52

12/17/02 INS Show Cause Letter Excerpt, Fully Reprinted at 11/8/05-App.2 . . . App. 53

5/7/03 INS Decision Letter Excerpt, Fully Reprinted at 11/8/05-App.3 . . . App. 55

Affidavit of 4/9/08 (Sealed) . . . App. 56

United States Court of Appeals
Fifth Circuit
FILED
August 16, 2007
Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-11163
consolidated with
No. 06-11387
Summary Calendar

GRETA CRAWFORD

Plaintiff-Appellant

v.
UNITED STATES DEPARTMENT OF HOMELAND SECURITY; UNITED STATES OF AMERICA

Defendants-Appellees

Appeals from the United States District Court
for the Northern District of Texas
No. 3:04-CV-2619

Before DeMOSS, STEWART, and PRADO, Circuit Judges.

PER CURIAM:**

Before the court is an appeal of multiple district court orders by Plaintiff-Appellant Greta Crawford ("Crawford"), proceeding pro se. This appeal follows the dismissal of Crawford's suit against Defendants-Appellees the United States Department of Homeland Security ("DHS") and the United States of America ("United States") (collectively "the government"). After careful consideration and review of the district court's orders, we find no reversible error and therefore affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

The suit arises from the government's decision not to hire Crawford for the position of immigration inspector with the DHS. Crawford, an African-American female, applied for the position of immigration inspector on May 4, 2002. The Office of Personal Management ("OPM") conducted a background investigation on behalf of DHS and made a preliminary determination that Crawford was unsuitable for employment based on its findings of "misconduct or negligence in employment" and

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** Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

"criminal or dishonest conduct." The misconduct finding stemmed from comments made by Crawford's former supervisor at Backus & Associates ("Backus"), where Crawford had previously been employed. The supervisor reported that Crawford was prone to explode in tirades of foul language at the slightest provocation, believed the government was out to get her, and demonstrated an aggressive distaste for her co-workers. Crawford was ultimately fired from this position. The criminal or dishonest conduct finding was based on three events: (1) Crawford's arrest and psychiatric evaluation in April 2001 after she was found banging her head against the wall of her apartment; (2) her arrest in July 1996 for assaulting her ex-boyfriend; and (3) her June 1996 conviction for being drunk in public.

The government notified Crawford of its determination that she was unsuitable for the position of immigration inspector in a "show cause" letter issued on December 17, 2002. The letter described the specific allegations upon which the OPM based its determination and gave Crawford an opportunity to respond with an explanation or documentary evidence to dispute the allegations.[1] Crawford submitted a response on February 1, 2003. Stanley Johnson ("Johnson"), a hiring director at the DHS, then

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[1] The show cause letter stated that Crawford had resigned from Backus to avoid being fired; however, Crawford has admitted that she was fired from Backus.

made the final decision that Crawford was unsuitable for employment as an immigration inspector in May 2003. Crawford appealed the decision in June, and a hearing took place before an administrative law judge ("ALJ") in November 2003. The ALJ found that the DHS failed to prove the allegations regarding Crawford's April 2001 arrest and July 1996 arrest by a preponderance of the evidence. However, the ALJ determined that the DHS did provide sufficient evidence of Crawford's misconduct while employed at Backus and her June 1996 conviction for being drunk in public. The ALJ rejected Crawford's claims that she had been discriminated against on the basis of race, gender, and disability and retaliated against for filing suit against the government in 2001. Consequently, the ALJ sustained the DHS's determination of unsuitability. Crawford filed a petition for review of the ALJ's decision with the Merit Systems Protection Board ("MSPB") on January 21, 2004, which was denied.

Crawford then filed the instant lawsuit against the government on December 9, 2004, bringing twenty-three causes of action.[2] The

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[2] Crawford's claims, as described in her complaint, were:

1st Claim for Relief: Dismissal of Remaining Agency Charges and Finding of Unsuitability;
2nd, 3rd and 4th Claim[s] for Relief: Due Process Deprivations and/or Failure to Adhere to Regulatory Provisions and Prohibited Practices and Denial of Confrontation and Cross-Examination;

5th Claim for Relief: Retaliation for Whistleblowing;
6th Claim for Relief: Discrimination;
7th Claim for Relief: Negligence;
8th, 9th and 10th Claim[s] for Relief: Right to Privacy and Contempt/Seals and Obstruction of Justice;
11th Claim for Relief: Harassment and Intimidation;
12th Claim for Relief: Conspiracy;
13th Claim for Relief: Freedom of Expression;
14th Claim for Relief: Right to Association;
15th Claim for Relief: Equal Protection;
16th and 17th Claim[s] for Relief: Interference with Business Relations, and Injury to Reputation;
18th Claim for Relief: Assault;
19th Claim for Relief: Abuse of Process;
20th Claim for Relief: Intentional Infliction of Emotional Distress;
21st Claim for Relief: Malicious Prosecution;
22nd Claim for Relief: Spoliation; and
23rd Claim for Relief: Contract Claim.

government filed a motion to dismiss, which the district court granted, dismissing twenty of Crawford's causes of action. The grounds for dismissal were (1) the claims were preempted by the Civil Service Reform Act of 1978 ("CSRA"), 5 U.S.C. § 1101, et seq. (2000), and (2) alternatively, to the extent Crawford was pursuing her claims through the Federal Torts Claim Act ("FTCA"), 28 U.S.C. §§ 1346, 2671, et seq., she had failed to exhaust her administrative remedies. The claims remaining, then, were Crawford's appeal of the government's unsuitability finding, her retaliation claim under the Whistleblower Protection Act, 5 U.S.C. § 2302(b)(8), and her claims of discrimination on the basis of race, gender, and disability.

As the case progressed, the district court denied two motions by Crawford seeking leave to amend her complaint. The district court also denied several motions to recuse, motions to seal, and motions regarding discovery filed by Crawford. The district court ultimately dismissed Crawford's remaining claims on a motion for summary judgment filed by the government and awarded costs to the government. Crawford has appealed the district court's orders regarding: (1) the government's motion to dismiss; (2) the government's motion for summary judgment; (3) her motions for leave to amend her complaint; (4) her discovery motions; (5) her motions to recuse; (6) her motions to seal; and (7) the award of costs. We have jurisdiction as a final judgment has been entered, see 28 U.S.C. § 1291, and now turn to the merits of the appeal.

II. DISCUSSION

A. Motion to Dismiss

Crawford first appeals the district court's decision to grant the government's motion to dismiss, which was filed pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.[3] Federal courts have limited jurisdiction, and a claim is properly dismissed for lack of subject matter jurisdiction when the court lacks statutory or constitutional power to adjudicate the claim. See Home Builders Ass'n of Miss., Inc. v. City of Madison, 143 F.3d 1006, 1010 (5th Cir. 1998). This court reviews a district court's grant of a motion to dismiss pursuant to Rule 12(b)(1) de novo. LeClerc v. Webb, 419 F.3d 405, 413 (5th Cir. 2005). Here, the district court ruled that Crawford's constitutional, tort, and contract claims were preempted by the CSRA or, in the alternative, were not administratively exhausted under the FTCA, and dismissed them accordingly.

Turning first to the CSRA, we note that it provides a comprehensive framework for the judicial and administrative review of prohibited personnel actions taken against federal employees and applicants for federal

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[3] The district court noted that the motion to dismiss would have been more properly pursued as a motion pursuant to Rule 12(b)(6) for failure to state a claim. Regardless, as our analysis shows, Crawford's claims were correctly dismissed.

employment. Chapter 23 of the CSRA outlines the prohibited personnel practices and establishes merit-system principles that govern civil service employment. See generally 5 U.S.C. §§ 2301-02. The CSRA also provides "an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration." Rollins v. Marsh, 937 F.2d 134, 137 (5th Cir. 1991) (internal quotation marks and citation omitted).

Given the remedial system set forth in the CSRA, we have held that the CSRA provides the exclusive remedy for claims against federal employers, thereby precluding any other causes of action. See Grishom v. United States, 103 F.3d 24, 26 (5th Cir. 1997) (per curiam); Rollins, 937 F.2d at 137-40. Consequently, courts have rejected constitutional, tort, and contract claims as being precluded by the CSRA. See, e.g., Bush v. Lucas, 462 U.S. 367, 368 (1983) (First Amendment claim); Grishom, 103 F.3d at 26 (First Amendment claim and claims under the FTCA); Rollins, 937 F.2d at 139-40 (constitutional claims and state common law claims); Wheeler v. Potter, No. 3:05-CV-0265-M, 2007 WL 268777, at *3 (N.D. Tex. Jan. 30, 2007) (contract claim).

The CSRA, however, specifically exempts discrimination claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., as well as discrimination claims under the Rehabilitation Act of 1973, 29 U.S.C. § 791, et seq., from its coverage. 5 U.S.C. § 2302(d). It also

provides that employment decisions may not be made in retaliation for an individual's disclosure of the government's violation of the law or its gross mismanagement of funds--the Whistleblower Protection Act. Id. § 2302(b)(8).

Here, all of Crawford's causes of action concern (1) the government's decision not to hire her and (2) the investigation conducted by the government in making that determination. Therefore, in light of the preclusive effect of the CSRA, the district court properly dismissed twenty of Crawford's causes of action, leaving only her appeal of the unsuitability determination, her discrimination claims, and her retaliation claim. Although Crawford argues that many of her claims are independent of the application process and do not fall under the CSRA, review of her complaint shows that all of her claims are related to her interaction with the government regarding the position she was seeking. Accordingly, the district court properly dismissed twenty of Crawford's causes of action as precluded by the CSRA.[4]

B. Motion for Summary Judgment

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[4] Because we affirm the district court's ruling on the motion to dismiss under the CSRA, we need not reach the district court's alternative holding that Crawford failed to exhaust her administrative remedies for seventeen of her causes of action under the FTCA. See McAfee v. 5th Circuit Judges, 884 F.2d 221, 222-23 (5th Cir. 1989) (per curiam) (holding that court lacks jurisdiction over FTCA claims that are not administratively exhausted).

Following the district court's order on the motion to dismiss, Crawford's only remaining claims were (1) the appeal of her unsuitability determination; (2) her claim of retaliation for whistleblowing; and (3) her discrimination claims. The district court granted summary judgment on each claim, which Crawford contends was erroneous.

1. Standard of Review

This court reviews the district court's grant of summary judgment de novo. Adams v. Travelers Indem. Co. of Conn., 465 F.3d 156, 163 (5th Cir. 2006). Summary judgment is proper when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. FED. R. CIV. P. 56(c); Adams, 465 F.3d at 163. If the moving party makes an initial showing that there is no evidence to support the nonmoving party's case, the non-moving party must come forward with competent summary judgment evidence of the existence of a genuine fact issue. See Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 586-87 (1986).

Here, our review and the district court's review of the MSPB's decision is constrained by 5 U.S.C. § 7703(c), which states-

[T]he court shall review the record and hold

> unlawful and set aside any agency action, findings, or conclusions found to be:
>
> (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (2) obtained without procedures required by law, rule, or regulation having been followed; or
>
> (3) unsupported by substantial evidence;
>
> except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have
> facts subject to trial de novo by the reviewing court.

Since Crawford brought both discrimination and non-discrimination claims, her appeal is a "mixed case" under 5 U.S.C. § 7703. See Aldrup v. Caldera, 274 F.3d 282, 285 (5th Cir. 2001). We must, therefore, accord deference to the MSPB's decision on Crawford's non-discrimination claims, but conduct a de novo review of Crawford's discrimination claims. Crawford argues that the district court erred by failing to decide her entire appeal by a de novo review. This argument is without merit, as § 7703 clearly requires a deferential standard of review for claims other than for discrimination. See 5

U.S.C. § 7703(c).

2. Suitability as an Immigration Inspector

Crawford first contends that the MSPB erred in upholding the decision that she was unsuitable for the position of immigration inspector. We may not overturn the MSPB's decision unless it was arbitrary or capricious or unsupported by substantial evidence. Id.

Pursuant to 5 C.F.R. § 731.202(b), the government is to consider "[m]isconduct or negligence in employment" and "[c]riminal or dishonest conduct" as factors when making suitability determinations. Evidence gathered in the OPM's background investigation showed both misconduct or negligence in employment and criminal or dishonest conduct by Crawford. Crawford's supervisor at Backus reported that Crawford had a propensity to "explode in tirades of foul language at the slightest provocation" and that Crawford believed that "the government was out to get her." Crawford also admitted in her application to DHS that she had been fired from this position. The government put on evidence that immigration inspectors are required to carry firearms, so applicants who are susceptible to any sort of tirade may reasonably be seen as unsuitable for that position. Crawford also admitted in her application for employment and in her sworn deposition testimony that she was arrested and convicted of being drunk in public in June1996. Therefore, that finding by the government is undisputed.

In support of her claim that she was suitable for the position, Crawford argues that her infractions were minor, that she did not deserve to be fired, and that she was fired as a scapegoat for larger problems at Backus. The ALJ and MSPB heard this same evidence and still decided to uphold the unsuitability finding. Crawford has not shown that such decision was arbitrary or capricious or unsupported by substantial evidence. Crawford also argues that some of the evidence of her unsuitability is inadmissible hearsay and should not have been considered. However, Crawford herself admitted that she was fired from Backus and was convicted of being drunk in public. Therefore, regardless of any hearsay that may have been allowed into evidence, Crawford does not dispute the basic allegations that prompted the unsuitability finding. Consequently, the district court properly affirmed the MSPB's decision that Crawford was unsuitable for employment as an immigration inspector.

3. Whistleblower Protection Act Claim

Crawford next argues that the district court erred by affirming the MSPB's finding that Crawford had not been subjected to retaliation for her prior lawsuit against the United States in violation of the Whistleblower Protection Act. In its summary judgment order, the district court determined that there was no evidence that the decision-maker was aware of Crawford's earlier lawsuit and, therefore, could not have retaliated

against her for bringing it.

The Whistleblower Protection Act ("WPA"), 5 U.S.C. § 2302(b)(8), prohibits governmental agencies from taking adverse personnel actions against employees or applicants for employment because the employee or applicant disclosed information that the employee or applicant believed evidenced a violation of law by the government or gross mismanagement of funds. An employee or applicant may demonstrate that the disclosure was a contributing factor in the personnel decision with evidence that "the official taking the personnel action knew of the disclosure" and "the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action." 5 U.S.C. § 1221(e)

Crawford filed a lawsuit against the Department of Justice in 2001. Her WPA claim is based on her belief that the government's knowledge of her lawsuit resulted in its decision to deny her application to be an immigration inspector. The district court ruled that Crawford failed to present competent summary judgment evidence showing that her 2001 lawsuit against the government was known to the decision-maker at DHS or that such knowledge was a contributing factor in the denial of her employment application by the DHS.

In support of her claim that Johnson, the decision-maker at the DHS, was aware of her 2001 lawsuit, Crawford asserts that in her response to the government's December 2002

show cause letter she made references to her 2001 lawsuit. Her response to the show cause letter, however, is vague and non-specific, referring only to a "sealed complaint" she filed in federal court without identifying any defendants. It fails to put the reader on notice that Crawford made a disclosure that would entitle her to protection under the WPA.

As further evidence of a WPA violation, Crawford asserts that she was cleared by the OPM after her show cause response, but then later rejected. Crawford, however, failed to identify any evidence which shows that she was cleared by the OPM at any time. As the party opposing summary judgment, Crawford is required to identify specific evidence in the record and to articulate the precise manner in which that evidence supports her claim. See Ragas v. Tenn. Gas Pipeline Co., 136 F.3d 455, 458 (5th Cir. 1998). Rule 56 of the Federal Rules of Civil Procedure does not impose a duty on the court to search the record for evidence that supports the non-moving party's opposition to the motion for summary judgment. Id.; see also Skotak v. Tenneco Resins, Inc., 953 F.2d 909, 915-916 (5th Cir. 1992). Therefore, Crawford's failure to identify evidence that the OPM had cleared her is fatal to her argument.

Crawford's assertion that the OPM investigator had a copy of her 2001 complaint is similarly not supported by evidence. The summary judgment evidence showed that Johnson was the individual who made the decision not to hire Crawford. Crawford did not

put on any evidence that he had possession of her 2001 complaint, nor did Crawford's evidence ever identify by name the person she claims had possession of the document. Crawford thus failed to specifically identify anyone who had knowledge of the suit and show that such knowledge was part of the determination that she was unsuitable. Given this lack of evidence, the MSPB's finding that there was no retaliation was not arbitrary or capricious, unsupported by substantial evidence, or obtained without the procedures required by law. Therefore, the district court properly refused to reverse the MSPB on Crawford's WPA claim, and we affirm the district court.

4. Title VII Discrimination Claims

We next turn to Crawford's claims of race and gender discrimination under Title VII. Pursuant to 5 U.S.C. § 7703(c), we review the district court's grant of the government's motion for summary judgment regarding Crawford's discrimination claims de novo, applying the same standard as the district court. See Russell v. McKinney Hosp. Venture, 235 F.3d 219, 222 (5th Cir. 2000).

a. Disparate Treatment

Title VII prohibits discrimination by employers "against any individual with respect to [her] compensation, terms, conditions, or privileges of employment, because of such

individual's race, color, religion, sex, or national origin . . . ." 42 U.S.C. § 2000e-2(a). Intentional discrimination can be proven by either direct or circumstantial evidence. Russell, 235 F.3d at 222. In order for evidence to be "direct," it must, if believed, prove the fact in question without inference or presumption. Fabela v. Socorro Indep. Sch. Dist., 329 F.3d 409, 415 (5th Cir. 2003) (citations omitted). If no direct evidence exists, we use the familiar burden-shifting framework created by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Under McDonnell Douglas, Crawford must first prove a prima facie case of discrimination by showing that (1) she is a member of a protected class; (2) she was qualified for the position; (3) she was not hired; and (4) the position was given to someone outside the protected class; or in the case of disparate treatment, show that others similarly situated were treated more favorably. See id.; Septimus v. Univ. of Houston, 399 F.3d 601, 609 (5th Cir. 2005). If Crawford establishes a prima facie case, the burden shifts to the government to "articulate some legitimate nondiscriminatory reason for the employee's rejection." McDonnell Douglas, 411 U.S. at 802. If the government meets this burden, Crawford must then create a genuine issue of material fact that either (1) the government's reason is not true, but is instead a pretext for discrimination; or (2) the government's reason, while true, is only one of the reasons for its conduct and that discrimination was a motivating factor in the government's decision. See Rachid v. Jack in the Box, Inc., 376 F.3d 305,

312 (5th Cir. 2004).

Crawford first claims that she has direct evidence of intentional racial discrimination. Crawford asserts that statements of surprise made by the OPM investigator about the race of her boyfriend constitute direct proof of discrimination. Contrary to Crawford's contention, such evidence cannot be said to be "direct evidence" of discrimination. In order to conclude that these statements show a discriminatory purpose behind the government's decision, the court would have to use inference or presumption, as surprise as to the race of another's boyfriend is not a clear indication of racial discrimination and the OPM investigator was not the decision-maker in this case. Therefore, the statements are not direct evidence that the government discriminated against Crawford.

Turning to the burden-shifting analysis for circumstantial evidence, we conclude that Crawford fails to establish a prima facie case. Crawford does not offer any evidence that someone outside her race or gender was hired in her place and admits she is unaware of whom the government hired. She also fails to show that anyone from outside her protected group was treated more favorably than she. Without such evidence, Crawford cannot establish a prima facie case of discrimination.

Even if we were to accept Crawford's prima facie case of discrimination, the government has articulated legitimate and non-discriminatory reasons for rejecting Crawford,

namely, the prior workplace misconduct and criminal conduct discovered in the OPM's background investigation.

Crawford's argument that she did not in fact engage in the misconduct is insufficient to create a fact issue that these reasons are a pretext for race or gender discrimination. See Bryant v. Compass Group USA, Inc., 413 F.3d 471, 478 (5th Cir. 2005) (stating that "evidence that the employer's investigation merely came to an incorrect conclusion does not establish a racial motivation behind an adverse employment decision"). She further offers no evidence that race or gender was a motivating factor in the government's decision. As stated by the district court, Crawford offers only "conclusory allegations, unsubstantiated assertions, and unsupported speculation," which are insufficient to prevent summary judgment. See Ramsey v. Henderson, 286 F.3d 264, 269 (5th Cir. 2002). Consequently, the district court did not err in determining that Crawford failed to present competent summary judgment evidence in support of her disparate treatment claims under Title VII.

b. Disparate Impact

Crawford also asserts that the government's failure to hire her was because of disparate impact discrimination. Disparate impact discrimination claims concern employment practices that are facially neutral but have a significantly disproportionate impact

on a protected class and cannot be justified by business necessity. See Raytheon Co. v. Hernandez, 540 U.S. 44, 52 (2003); see also 42 U.S.C. § 2000e-2(k)(1)(A). Disparate impact claims do not require proof of discriminatory intent. Munoz v. Orr, 200 F.3d 291, 299 (5th Cir. 2000). Rather, disparate impact claims focus on those facially neutral employment practices that create statistical disparities which disadvantage members of protected classes at a level functionally equivalent to intentional discrimination. Id.

A prima facie case of discrimination by disparate impact requires that Crawford: (1) identify the challenged employment practice or policy, and pinpoint the government's use of it; (2) demonstrate a disparate impact on a protected group under Title VII; and (3) demonstrate a causal relationship between the identified practice and the disparate impact. See Gonzalez v. City of New Braunfels, 176 F.3d 834, 839 n.26 (5th Cir. 1999). The government may rebut a prima facie case of disparate impact by demonstrating that a challenged practice is a business necessity. Pancheco v. Mineta, 448 F.3d 783, 787 (5th Cir.), cert. denied, 127 S. Ct. 299 (2006).

Crawford insists that the government's use of background checks on prospective employees has a disparate impact on African-Americans and women. As proof of disparate impact, Crawford provides statistics suggesting a disparity between the racial and gender makeup of immigration inspectors when compared with

the general population. Our precedent, however, suggests that the comparison must be made between the employer's work force and the pool of applicants. See E. Baton Rouge Parish Sch. Bd., 320 F.3d 570, 579 (5th Cir. 2003) (comparing those hired with the pool of applicants); see also Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 308 (1977) (noting "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value."). While Crawford's statistics may be accurate, they are not properly tailored to create a prima facie case for disparate impact, as she focuses on disparities with the general population, rather than the applicant pool.[5] Further, even if the court accepted Crawford's statistical analysis, she has not shown that the use of background checks is the cause of any statistical imbalance. As a result, Crawford has failed to create a prima facie case of disparate impact discrimination, and the district court properly granted summary judgment on this claim.

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[5] Crawford's contention that the district court raised this argument sua sponte is misplaced. The government moved for summary judgment on Crawford's disparate impact claim on the grounds that she had no evidence of a disparity, thereby putting Crawford's statistical analysis at issue.

5. Disability Discrimination Claim

In addition to Crawford's discrimination claims based on race and gender, Crawford alleges she was discriminated against because of a perceived disability in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12112.[6] Although Crawford admits she is not disabled under the ADA, she accuses the government of believing she was psychologically impaired and discriminating against her accordingly.[7] As with her Title VII claim, Crawford asserts that she suffered disparate treatment and disparate impact discrimination as a result of her perceived disability.

a. Disparate Treatment

Disparate treatment claims under the ADA are also governed by the three-step burden-shift analysis created by McDonnell Douglas. Seaman v. CSPH, Inc., 179 F.3d 297, 300 (5th Cir. 1999). To establish a prima facie case, Crawford must show that she "(1) suffers from a disability; (2) was qualified for the job; (3) was subject to an

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[6] The provisions of the ADA are made applicable to federal employees through the Rehabilitation Act. See 29 U.S.C. § 791(g).

[7] Claims under the ADA are not listed in among the discrimination claims in 5 U.S.C. § 7703(b)(2) & (c) as requiring de novo review. We will, however, conduct a de novo review of the claims, as Crawford's arguments still fail.

adverse employment action; and (4) was replaced by a non-disabled person or treated less favorably than non-disabled employees." Id. To be considered disabled under the ADA, an individual must have (1) a physical or mental impairment that substantially limits one or more major life activities; (2) have a record of such impairment; or (3) be regarded as having such an impairment. 42 U.S.C. § 12102(2).

Crawford contends that the OPM's finding of unsuitability was based on a perceived disability and points to documents that reference her psychological condition and ill health. Although she admits that she is not disabled, she maintains that the government regarded her as disabled. To be "regarded as" disabled under the ADA, Crawford must:

> (1) ha[ve] an impairment which is not substantially limiting but which the employer perceives as . . . substantially limiting . . . ; (2) ha[ve] an impairment which is substantially limiting only because of the attitudes of others toward such an impairment; or (3) ha[ve] no impairment at all but is regarded by the employer as having a substantially limiting impairment.

Rodriguez v. ConAgra Grocery Prods. Co., 436 F.3d 468, 475 (5th Cir. 2006) (internal citation omitted).

The district court found that Crawford offered no competent summary judgment evidence to meet this standard. We agree. While

there is some indication that the government was concerned with information regarding Crawford's previous behavior and mental state, this is not sufficient evidence to create a fact issue regarding discrimination based on disability. Believing an applicant is unsuitable or incapable of performing a particular job does not equate to labeling the employee as substantially impaired. See Ellison v. Software Spectrum, Inc., 85 F.3d 187, 192 (5th Cir. 1996). Further, for the reasons discussed earlier regarding Crawford's claims of race and gender discrimination, Crawford has failed to show that the government's legitimate and nondiscriminatory reasons for not hiring her were a pretext for disability discrimination or that discrimination was a motivating factor in the government's decision.

b. Disparate Impact

Crawford also asserts that the government's use of background checks has a disparate impact on the disabled. However, Crawford again offers no valid statistical evidence or analysis regarding the effect of a background checks on the employment of disabled individuals. The district court found no genuine issue of material fact on this issue, and we affirm.

c. Reasonable Accommodation

Crawford next claims that the government failed to make a reasonable accommodation for

her disability. Under the ADA, an employer is liable for failing to accommodate qualified individuals with known physical or mental limitations, unless the employer can demonstrate that such accommodation would impose an undue hardship. 42 U.S.C. § 12112(b)(5)(A). However, an employer is not required to accommodate an employee who it regards as disabled, but rather only those individuals who are actually limited and have requested an accommodation. See Gammage v. W. Jasper Sch. Bd. of Educ., 179 F.3d 952, 955 (5th Cir. 1999); Burch v. Coca-Cola Co., 119 F.3d 305, 314 (5th Cir. 1997). Here, Crawford admits that she is not disabled, and there is no evidence that she requested an accommodation. Consequently, the government was under no obligation to accommodate any "disability" and cannot be held liable for failing to do so. We therefore affirm the district court's decision to grant summary judgment on this claim.

C. Motions to Amend Complaint

Crawford appeals the district court's decision to deny her first and third motions for leave to amend her complaint.[8] Review of the

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[8] Crawford asserts that she filed a "second" motion for leave to amend her complaint. The docket sheet, however, does not reflect that any such motion was filed. A motion not filed is not part of the record on appeal and may not be considered on its merits. See GHR Energy Corp. v. Crispin Co. (In re GHR Energy Corp.), 791 F.2d 1200, 1201-

district court's denial of the motions for leave to amend complaint is for an abuse of discretion. Carroll v. Fort James Corp., 470 F.3d 1171, 1174 (5th Cir. 2006).

Crawford makes a valid argument that she should have been allowed to amend her complaint once as a matter of course under the Federal Rules of Civil Procedure. Rule 15(a) states:

> A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served.

Although the government had filed a motion to dismiss at the time Crawford first sought to

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02 (5th Cir. 1986) (per curiam) ("[T]his court is barred from considering filings outside the record on appeal, and attachments to briefs do not suffice."). Therefore, we will only consider her first and third motions.

amend her complaint, it had not filed an answer. Our precedent is clear that a motion to dismiss is not considered a "responsive pleading" that would cut off the right to amend a pleading as a matter of course. McKinney v. Irving Indep. Sch. Dist., 309 F.3d 308, 315 (5th Cir. 2002). Since the government had not filed an answer to Crawford's original complaint at the time Crawford filed her motion for leave to amend, Crawford could amend her complaint once as matter of course. See FED. R. CIV. P. 15(a).

Our analysis of this issue does not end here, however. The government argues that even if the motions to amend were denied improperly, the error was harmless. We agree. In her two motions to amend, Crawford sought to add Michael Chertoff (Secretary of the DHS), Johnson (DHS Hiring Director), the Department of Justice, Alberto Gonzales (United States Attorney General), the OPM, and Linda Springer (Director of the OPM) as defendants. She also sought to include four new claims for relief: "buy and sale of an office," "deception/fraud," antitrust, and unlawful seizures and surveillance. Crawford has not explained why these claims are not precluded by the CSRA or subject to the administrative exhaustion requirements of the FTCA. Indeed, the claims, as described in her amended complaints, are vague, unclear, and conclusory.[9] Therefore, as Crawford's addition of

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[9] For example, in Crawford's third amended complaint, her antitrust allegation states:

these new defendants and claims by way of her amended complaints would have been futile, the district court did not commit reversible error in denying Crawford leave to amend.

D. Discovery Issues

Crawford next takes issue with several

In addition to the anticompetitive acts set forth in the whistleblowing claims above, the use of businesses to carry forth an investigation that had already been completed, or other acts of harassment are pernicious, malicious, and predatory acts that restrain trade from state to state, nation to nation, and office to office . . . . The petitioner was economically intimidated and oppressed, and competitors enjoyed an unlawful advantage over her.

No further description of her antitrust claim is given.

rulings by the district court on discovery matters. Rulings on discovery are reviewed for an abuse of discretion and will be affirmed unless the decisions were arbitrary or clearly unreasonable. Moore v. Willis Indep. Sch. Dist, 233 F.3d 871, 876 (5th Cir. 2000).

First, Crawford appeals the district court's denial of her motion to "streamline" discovery by allowing depositions upon written questions to be taken without an officer. Rule 31 of the Federal Rules of Civil Procedure clearly states that an officer is to take responses and prepare the record of depositions upon written questions. FED. R. CIV. P. 31(b). Although Rule 29 may allow parties to waive this requirement by agreement, there is no evidence such an agreement was made. Consequently, the district court did not abuse its discretion in denying this motion.[10]

Second, Crawford argues that a number of the government's responses to her discovery requests were insufficient and that the district court erred in not compelling further discovery from the government. Crawford, however, does not show that the district court abused its discretion in any way and her arguments on this point are somewhat unclear. Looking at Crawford's motion to compel and the district court's order, it appears that the district court reasonably limited the government's responses to

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[10] Crawford also makes some mention of judicial estoppel here, but we see no evidence that the government has taken inconsistent legal positions on this issue.

Crawford's broad discovery requests. Therefore, we affirm the district court's rulings on discovery.

E. Motions to Recuse

Crawford also appeals the district court's orders denying her motions to recuse the magistrate judge and the district judge's law clerk. The denial of a motion to recuse is reviewed under an abuse of discretion standard. Matassarin v. Lynch, 174 F.3d 549, 571 (5th Cir. 1999).

Crawford requested that the magistrate judge recuse himself in this case because he had ruled against her in previous litigation. The district court denied her motion under 28 U.S.C. §§ 144 and 455, stating that Crawford's allegations of bias and partiality were conclusory and speculative. Crawford's allegations fare no better on appeal. In order for a judge to be disqualified for bias or prejudice, the bias must stem from an extrajudicial source and result in an opinion on some basis other than what the judge learned in the case. United States v. Grinnell Corp., 384 U.S. 563, 583 (1966); United States v. MMR Corp., 954 F.2d 1040, 1045 (5th Cir. 1992). Recusal is warranted when a reasonable person, knowing all the circumstances, would harbor doubts about the judge's impartiality. See Chitimacha Tribe of La. v. Harry L. Laws Co., 690 F.2d 1157, 1167 (5th Cir. 1982). Here, there is no evidence beyond Crawford's pure speculation that the magistrate judge was prejudiced by his involvement in prior proceedings with Crawford.

See Liteky v. United States, 510 U.S. 540, 555 (1994) (noting that judicial rulings alone are almost never a valid basis for recusal). A reasonable person would not harbor doubts about the magistrate judge's impartiality, so we affirm the decision to deny Crawford's motion to recuse.

Similarly, Crawford's motion to recuse the district judge's law clerk is based on unsupported speculation. Crawford asserts that the law clerk previously litigated against Crawford when the law clerk was employed by the City of Dallas. As the district court stated, the facts of this case and Crawford's claim against the City of Dallas are unrelated, the law clerk had no first-hand knowledge of the facts of this case, and the final decisions in this case were made by the judge, not the law clerk. In so holding, the district court did not abuse its discretion, and therefore we affirm the denial of Crawford's motion to recuse the district judge's law clerk.

F. Sealing Documents

Next, Crawford appeals several of the district court's orders denying various motions to seal numerous documents. We review the district court's rulings on sealing documents for an abuse of discretion. See S.E.C. v. Van Waeyenberghe, 990 F.2d 845, 848 (5th Cir. 1993). Looking at the district court's orders, it is clear that the district court considered Crawford's motions to seal on a document-by-document basis. We note that the district court sealed a large number of the documents in this case at Crawford's request, but

specifically refused to seal others that had no private or confidential information in them.[11] On appeal, Crawford has failed to show that the district court abused its discretion in this regard. Therefore, we affirm the decisions of the district court regarding Crawford's motions to seal.

G. Costs

Finally, Crawford argues that the district court erred by including the cost of her deposition when taxing costs against her and by taxing costs prior to the outcome of this appeal. This court reviews a lower court's taxing of costs under an abuse of discretion standard and grants the lower court "'great latitude in this determination.'" Stearns Airport Equip. Co. v. FMCCorp., 170 F.3d 518, 536 (5th Cir. 1999) (quoting Fogleman v. ARAMCO, 920 F.2d 278, 285-86 (5th Cir. 1991)).

Pursuant to 28 U.S.C. § 1920(2), a court may tax the cost of a court reporter's fees for a stenographic transcript obtained for use in the case. Depositions are clearly included within the phrase "stenographic transcript." See Stearns, 170 F.3d at 536; United States v. Kolesar, 313 F.2d 835, 837-38 (5th Cir. 1963). Crawford argues that the cost of her deposition was unnecessary because she gave testimony at the MSPB hearing.

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[11] For example, the district court refused to seal Crawford's certificate of interested persons, her motion to seal, and her motion for a temporary restraining order.

Regardless of her testimony at the MSPB hearing, the government was allowed to depose Crawford concerning her allegations in this case, which, as discussed earlier, exceeded her claims at the MSPB hearing. Crawford also asserts that the transcripts were unreliable, but she has provided no evidence of this. Further, there was no reason to delay the taxing of costs. Consequently, the district court did not abuse its discretion in awarding costs in the amount of $499.75 to the government, and we affirm its judgment.

III. CONCLUSION

For the foregoing reasons, we find no reversible error in the decisions of the district court and so affirm the judgment against Crawford.

AFFIRMED.

US Merit Systems Protection Board
Dallas Field Office

Initial Decision of 12/19/2003

(Sealed)

United States Court of Appeals
FILED
January16, 2007
Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-11163

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cons/ w 06-11387

GRETA CRAWFORD

Plaintiff-Appellant

v.
UNITED STATES DEPARTMENT OF HOMELAND SECURITY; UNITED STATES OF AMERICA

Defendants-Appellees

Appeal from the United States District Court
for the
Northern District of Texas, Dallas

ON PETITION FOR REHEARING AND REHEARING EN BANC

(Opinion August 16, 2007, 5 Cir., __, ___, F.3d __)

Before DeMOSS, STEWART and PRADO, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that THE court be polled on Rehearing En Banc, (FED. R. App. P. and 5th Cir. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of hte members of the court and a majority of the judges who are in regular active services and not disqualified not having voted in favor, (FED. R. App. P. and 5th Cir. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:
/s/ Edward C. Prado
United States Circuit Judge
REHG-4A

TITLE 5 MERIT SYSTEM PRINCIPLES

Sec. 2301. Merit system principles

(a) This section shall apply to--

(1) an Executive agency; and

(2) the Government Printing Office.

(b) Federal personnel management should be implemented consistent with the following merit system principles:

(1) Recruitment should be from qualified individuals from appropriate sources in an endeavor to achieve a work force from all segments of society, and selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity.

(2) All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights.

(3) Equal pay should be provided for work of equal value, with appropriate consideration of both national and local rates paid by employers in the private sector, and appropriate incentives and recognition should be provided for excellence in performance. (4) All employees should maintain high standards of integrity, conduct, and concern for the public interest.

(5) The Federal work force should be used efficiently and effectively.

(6) Employees should be retained on the basis of the adequacy of their performance, inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards.

(7) Employees should be provided effective education and training in cases in which such education and training would result in better organizational and individual performance.

(8) Employees should be--

(A) protected against arbitrary action, personal favoritism, or coercion for partisan political purposes, and

(B) prohibited from using their official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for election.

(9) Employees should be protected against reprisal for the lawful disclosure of information which the employees reasonably believe evidences--

(A) a violation of any law, rule, or regulation, or

(B) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

(c) In administering the provisions of this chapter--

(1) with respect to any agency (as defined in section 2302(a)(2)(C) of this title), the President shall, pursuant to the authority

otherwise available under this title, take any action, including the issuance of rules, regulations, or directives; and

(2) with respect to any entity in the executive branch which is not such an agency or part of such an agency, the head of such entity shall, pursuant to authority otherwise available, take any action, including the issuance of rules, regulations, or directives;

which is consistent with the provisions of this title and which the President or the head, as the case may be, determines is necessary to ensure that personnel management is based on and embodies the merit system principles.

TITLE 5 MERIT SYSTEM PRINCIPLES

Sec. 2302. Prohibited personnel practices

(a)(1) For the purpose of this title, ``prohibited personnel practice" means any action described in subsection (b).
(2) For the purpose of this section--
(A) ``personnel action" means--
(i) an appointment;
(ii) a promotion;
(iii) an action under chapter 75 of this title or other disciplinary or corrective action;
(iv) a detail, transfer, or reassignment;
(v) a reinstatement;
(vi) a restoration;
(vii) a reemployment;
(viii) a performance evaluation under chapter 43 of this title;
(ix) a decision concerning pay, benefits, or awards, concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph;
(x) a decision to order psychiatric testing or examination; and
(xi) any other significant change in duties, responsibilities, or working conditions;

with respect to an employee in, or applicant for, a covered position in an agency, and in the case

of an alleged prohibited personnel practice described in subsection (b)(8), an employee or applicant for employment in a Government corporation as defined in section 9101 of title 31;

(B) ``covered position'' means, with respect to any personnel action, any position in the competitive service, a career appointee position in the Senior Executive Service, or a position in the excepted service, but does not include any position which is, prior to the personnel action--

(i) excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character; or

(ii) excluded from the coverage of this section by the President based on a determination by the President that it is necessary and warranted by conditions of good administration; and

(C) ``agency'' means an Executive agency and the Government Printing Office, but does not include--

(i) a Government corporation, except in the case of an alleged prohibited personnel practice described under subsection (b)(8);

(ii) the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the National Security Agency, and, as determined by the President, any Executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence

activities; or

(iii) the Government Accountability Office.

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority--

(1) discriminate for or against any employee or applicant for employment--

(A) on the basis of race, color, religion, sex, or national origin, as prohibited under section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16);

(B) on the basis of age, as prohibited under sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a);

(C) on the basis of sex, as prohibited under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d));

(D) on the basis of handicapping condition, as prohibited under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791); or

(E) on the basis of marital status or political affiliation, as prohibited under any law, rule, or regulation;

(2) solicit or consider any recommendation or statement, oral or written, with respect to any individual who requests or is under consideration for any personnel action unless such recommendation or statement is based on the personal knowledge or records of the person furnishing it and consists of--

(A) an evaluation of the work

performance, ability, aptitude, or general qualifications of such individual; or

(B) an evaluation of the character, loyalty, or suitability of such individual; (3) coerce the political activity of any person (including the providing of any political contribution or service), or take any action against any employee or applicant for employment as a reprisal for the refusal of any person to engage in such political activity; (4) deceive or willfully obstruct any person with respect to such person's right to compete for employment;

(5) influence any person to withdraw from competition for any position for the purpose of improving or injuring the prospects of any other person for employment;

(6) grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment;

(7) appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian position any individual who is a relative (as defined in section 3110(a)(3) of this title) of such employee if such position is in the agency in which such employee is serving as a public official (as defined in section 3110(a)(2) of this title) or over which such employee exercises

jurisdiction or control as such an official;

(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of--

(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences--

(i) a violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or

(B) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences--

(i) a violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

(9) take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of--

(A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation;

(B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A);

(C) cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel, in accordance with applicable provisions of law; or

(D) for refusing to obey an order that would require the individual to violate a law;

(10) discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others; except that nothing in this paragraph shall prohibit an agency from taking into account in determining suitability or fitness any conviction of the employee or applicant for any crime under the laws of any State, of the District of Columbia, or of the United States;

(11)(A) knowingly take, recommend, or approve any personnel action if the taking of such action would violate a veterans' preference requirement; or

(B) knowingly fail to take, recommend, or approve any personnel action if the failure to take such action would violate a veterans' preference requirement; or

(12) take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation

implementing, or directly concerning, the merit system principles contained in section 2301 of this title.

This subsection shall not be construed to authorize the withholding of information from the Congress or the taking of any personnel action against an employee who discloses information to the Congress.

(c) The head of each agency shall be responsible for the prevention of prohibited personnel practices, for the compliance with and enforcement of applicable civil service laws, rules, and regulations, and other aspects of personnel management, and for ensuring (in consultation with the Office of Special Counsel) that agency employees are informed of the rights and remedies available to them under this chapter and chapter 12 of this title. Any individual to whom the head of an agency delegates authority for personnel management, or for any aspect thereof, shall be similarly responsible within the limits of the delegation.

(d) This section shall not be construed to extinguish or lessen any effort to achieve equal employment opportunity through affirmative action or any right or remedy available to any employee or applicant for employment in the civil service under--

(1) section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), prohibiting discrimination on the basis of race, color, religion, sex, or national origin;

(2) sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29

U.S.C. 631, 633a), prohibiting discrimination on the basis of age;

(3) under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)), prohibiting discrimination on the basis of sex;

(4) section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), prohibiting discrimination on the basis of handicapping condition; or

(5) the provisions of any law, rule, or regulation prohibiting discrimination on the basis of marital status or political affiliation.

(e)(1) For the purpose of this section, the term ``veterans' preference requirement'' means any of the following provisions of law:

(A) Sections 2108, 3305(b), 3309, 3310, 3311, 3312, 3313, 3314, 3315, 3316, 3317(b), 3318, 3320, 3351, 3352, 3363, 3501, 3502(b), 3504, and 4303(e) and (with respect to a preference eligible referred to in section 7511(a)(1)(B)) subchapter II of chapter 75 and section 7701.

(B) Sections 943(c)(2) and 1784(c) of title 10.

(C) Section 1308(b) of the Alaska National Interest Lands Conservation Act.

(D) Section 301(c) of the Foreign Service Act of 1980.

(E) Sections 106(f),\1\ 7281(e), and 7802(5) \1\ of title 38.

(F) Section 1005(a) of title 39.

(G) Any other provision of law that the Director of the Office of Personnel Management designates in regulations as being a veterans' preference requirement for the purposes of this subsection.

(H) Any regulation prescribed under subsection (b) or (c) of section 1302 and any other regulation that implements a provision of law referred to in any of the preceding subparagraphs.

(2) Notwithstanding any other provision of this title, no authority to order corrective action shall be available in connection with a prohibited personnel practice described in subsection (b)(11). Nothing in this paragraph shall be considered to affect any authority under section 1215 (relating to disciplinary action).

TITLE 5 ADMINISTRATIVE PERSONNEL CHAPTER PART Subpart B_Suitability Determinations

Sec. 731.202 Criteria.

(a) General. In determining whether its action will protect the integrity or promote the efficiency of the service, OPM, or an agency to which OPM has delegated authority, shall make its determination on the basis of the specific factors in paragraph (b) of this section, with appropriate consideration given to the additional considerations outlined in paragraph (c) of this section.

(b) Specific factors. When making a determination under paragraph (a) of this section, the following may be considered a basis for finding an individual unsuitable:

(1) Misconduct or negligence in employment;

(2) Criminal or dishonest conduct;

(3) Material, intentional false statement or deception or fraud in examination or appointment;

(4) Refusal to furnish testimony as required by Sec. 5.4 of this title;

(5) Alcohol abuse of a nature and duration which suggests that the applicant or appointee would be prevented from performing the duties of the position in question, or would constitute a direct threat to the property or safety of others;

(6) Illegal use of narcotics, drugs, or other controlled substances, without evidence of substantial rehabilitation;

Affidavit of April 9, 2008

(Sealed)